No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STEVEN LOFTON, *et al.*,

Petitioners,

—v.—

SECRETARY OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Did the Eleventh Circuit correctly hold that the Fourteenth Amendment permits a state categorically to exclude gay people and no one else from its case-by-case evaluation process for deciding who may adopt children into permanent homes?

LIST OF PARTIES

Petitioners are Steven Lofton; Douglas E. Houghton, Jr.; John Doe and John Roe, minor children, by and through their next friend, Timothy Arcaro; Wayne LaRue Smith; and Daniel Skahen. Angela Gilmore is named as a plaintiff in the opinion of the Eleventh Circuit but was dismissed as a party in the District Court and is not a petitioner here.

Respondents are the Secretary of the Florida Department of Children and Families and the District Administrator of District XI of the Florida Department of Children and Families.[1] Charlie Crist, Attorney General of the State of Florida, and Robert Pappas, District Administrator of District X of the Florida Department of Children and Families, are named as defendants in the opinion of the Eleventh Circuit but were dismissed as parties in the District Court and are not respondents here.

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[1] The opinions of the Eleventh Circuit identified the Department as the Department of Children and Family Services.

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OPINIONS AND ORDERS BELOW

The decision of the District Court granting summary judgment to the defendants and dismissing plaintiffs' complaint was entered on August 30, 2001. The court's opinion is published as *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001), and is reprinted in the Appendix ("App.") at 113a.

The Eleventh Circuit decision affirming the District Court was entered on January 28, 2004, is published as *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), and is reprinted at App. 1a.

On July 21, 2004, the Eleventh Circuit denied plaintiffs' petition for rehearing *en banc* by an evenly divided court. The denial of the petition, along with two dissenting opinions and a special concurrence, are published as *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 377 F.3d 1275 (11th Cir. 2004), and reprinted at App. 41a.

JURISDICTION

The Eleventh Circuit's decision affirming the District Court's grant of final summary judgment was entered on January 28, 2004. On July 21, 2004, that court entered an order denying plaintiffs' petition for rehearing *en banc*.[2] This

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[2] The petition was denied by a vote of 6-6. One of the votes against *en banc* review was cast by the Hon. William H. Pryor, Jr. The Eleventh Circuit is considering in another case whether Judge Pryor was properly named to the Court as a recess appointment during an intra-session adjournment of Congress, and thus, whether he has the authority to sit as a judge on that Court. *Stephens v. Evans*, No. 02-16424 (11th Cir.). Because the issue posed in *Stephens* is also posed in this case and the six votes in favor of rehearing would be a majority of the Court if it determines that it has only eleven judges, plaintiffs moved for a stay of the issuance of the mandate by the Court of Appeals pending its decision in *Stephens* regarding the validity of the recess appointment of Judge Pryor. The Eleventh Circuit granted that motion

Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fla. Stat. § 63.042 provides:

> Who may be adopted; who may adopt.
> (1) Any person, a minor or an adult, may be adopted.
> (2) The following persons may adopt:
> a) A husband and wife jointly;
> b) An unmarried adult; or
> c) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if:
> 1. The other spouse is a parent of the person to be adopted and consents to the adoption; or
> 2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best

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on August 4, 2004. Because the stay of the mandate does not toll the time for filing a petition for *certiorari* under the Supreme Court rules, plaintiffs have filed this petition.

The issue of the validity of Judge Pryor's recess appointment is also pending before this Court in a petition for *certiorari*. *Miller v. United States*, No. 04-38. For the same reason petitioners asked for a stay of the mandate in the Eleventh Circuit, if the Court grants review in *Miller*, it should hold this petition until it resolves the validity of the appointment. This issue is fairly encompassed within the question presented because if Judge Pryor was not constitutionally authorized to sit on the Court of Appeals, plaintiffs' rehearing petition would have been granted and the Panel decision would have been vacated.

interest of the child.

(3) No person eligible to adopt under this statute may adopt if that person is a homosexual.

(4) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or handicap renders such person incapable of serving as an effective parent.

STATEMENT OF THE CASE

The challenged statute and Florida's child welfare system

Florida, alone among the states, categorically disqualifies eligible lesbians and gay men—and only lesbians and gay men—from being considered as potential adoptive parents.[3] Fla. Stat. § 63.042(3) says:

> No person eligible to adopt under this statute may adopt if that person is a homosexual.

Florida's system of individualized evaluation of adoption applicants in light of children's needs. The blanket exclusion of gay people is an aberration within Florida adoption law, which otherwise provides that all adoption applicants are evaluated on a case-by-case basis. *See* Fla. Stat., ch. 63; § 63.125. This individualized evaluation process aims to find adoptive parents who are able to meet the unique needs of each child who is waiting to be adopted, *see* Fla. Admin. Code §§ 65C-16.002, 65C-16.004, 65C-16.005, and, thus, to

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[3] No other state categorically excludes gay people from adopting. One state, Mississippi, statutorily prohibits adoption by same-sex couples, Miss. Code § 93-17-3(2), and in 1999, Arkansas enacted a regulation that excludes families with gay household members from serving as foster parents, but not from adopting, Arkansas Minimum Licensing Standards for Child Welfare Agencies § 200.3.2.

provide a "permanent family" for as many children as possible, *see* Fla. Stat. § 409.166(1) ("It is the intent of the Legislature to protect and promote every child's right to the security and stability of a permanent family home.").

Florida does not exclude unmarried people from adopting. In fact, the adoption law expressly permits single people to adopt, Fla. Stat. § 63.042(2)(b), and the State has no preference for married applicants. *See* Fla. Admin. Code § 65C-16.005(6)(e).[4] Florida actively *recruits* single individuals to adopt, and 25 percent of the adoptions the State approves are to single people. Record 145 (Deposition of Carol Hutchison ("Hutchison Dep."), at 118-19); App. 150a, ¶ 24. Single applicants are not excluded from adopting if they do not intend to marry. Record 145 (Hutchison Dep., at 113). Florida's Department of Children and Families recognizes that for certain children, single parents are preferred, even over available married couples. Record 145 (Hutchison Dep., at 53-54, 109-11, 115).

Nor does Florida categorically exclude adoption applicants who are disabled. State law prohibits the exclusion of disabled individuals unless there is a determination that the disability "renders such person incapable of serving as an effective parent." Fla. Stat. § 63.042(4); *see also* Fla. Admin. Code § 65C-16.005(9)(1) (applicants with serious or chronic medical conditions that compromise or could compromise the ability to care for a child are subject to special review).

Florida considers adoption applications from people who have previously failed as adoptive parents. *See* Fla. Admin. Code § 65C-16.005(3)(d) (applicants who have experienced

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[4] In 2003, Florida repealed a regulation that had expressed a preference for married couples over single parent placements unless a single parent was deemed best for a particular child's needs. Fla. Admin. Code § 65C-16.005(6)(f) (2002).

adoption dissolution or disruption must be "carefully evaluated"). Nor does it bar applicants about whom the State has had concerns as foster parents. *See id.* § 65C-16.005(9)(4) (such applicants must undergo special review).

Florida does not even categorically disqualify those with characteristics it knows frequently pose a serious threat to children, such as substance abusers and people with a history of domestic violence. App. 147a-148a, ¶¶ 1, 3; App. 134a, ¶¶ 1, 2. Parental substance abuse can be so damaging to children that it plays a role in over half of the cases in which children are removed from their families in Florida. App. 134a, ¶ 2 (57% of cases). Yet, individuals with a history of substance abuse can apply to adopt and be individually considered for their suitability to care for children. App. 147a-148a, ¶ 1. The same is true of people who have committed acts of child abuse. App. 148a, ¶ 3. Recognizing the danger of this latter group, Florida requires special review of applicants who have previous verified findings of abuse, neglect or abandonment, Fla. Admin. Code § 65C-16.005(9), but does not automatically disqualify them.[5]

Instead of using blanket exclusions, Florida "carefully observe[s], screen[s] and evalute[s]" each applicant for his or her ability to meet the "physical, emotional, social, educational and financial needs of a child." Fla. Admin. Code § 65C-16.005(2). Adoption applicants are subjected to a home study, a reference check, and criminal records and child abuse registry checks. Fla. Admin. Code §§ 65C-16.005(2), 65C-16.005(3)(o), 65C-16.007. Through this process, the

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[5] Individuals convicted of certain violent felonies are barred from adopting children who are in State custody. Fla. Stat. § 435.045. This provision was enacted to comply with the federal Adoption and Safe Families Act of 1997 (Public Law 105-89). Record 131 (Deposition of Linda Radigan, at 94-95). But those felons are not categorically excluded from adopting other children. *See* Fla. Stat., ch. 63; Fla. Admin. Code §§ 65C-16.001 *et seq.*

State excludes individuals it deems incapable of meeting a child's needs. Fla. Admin. Code § 65C-16.005; App. 148a, ¶¶ 2) (State excludes substance and domestic abusers where they are determined to pose a threat to children).

The singular exception from this system of case-by-case evaluations is made for gay people. Regardless of individual ability, family ties to the child or any other circumstances, the State conclusively treats all members of this class as inherently unfit to adopt. But at the same time, Florida demonstrates its trust in the parenting ability of countless lesbians and gay men by placing children in foster care—including in what the State calls long-term "de facto permanent" placements—with gay people. App. 148a, ¶¶ 6-8; 150a, ¶¶ 29, 31; Record 24 (Defendants' Motion to Dismiss, at 10). Florida likewise places children in the care of lesbians and gay men in unsupervised guardianships. App. 148a, ¶¶ 9-11. In contrast with its experience with substance abusers and child abusers, the State does not know of a single child who is in foster care because of any harm associated with the lesbian or gay orientation of parents or caregivers. App. 148a, ¶ 5.

The history of the challenged law. To understand why Florida would disqualify gay people, whom it knows pose no threat to children, while individually evaluating applications from the most dangerous people, one need look only at the legislative history of the statute.

The law was enacted in 1977. Dade County had just passed one of the first sexual orientation anti-discrimination ordinances in the country. The ordinance was met with an intense repeal campaign, which included a crusade led by entertainer Anita Bryant, that demonized gay people as a public menace. Against this backdrop, a bill to bar adoption by gay people was introduced and passed in the Florida legislature. *See* App. 91a-94a (Barkett, J., dissenting) (chronicling the legislative history of the challenged statute).

The political environment and the absence of any real discussion about children in the legislative debates (*id.*) make it clear that this law was enacted not to promote children's welfare, but to disadvantage gay people. As the law's sponsor, Sen. Curtis Peterson, put it, the purpose of the bill was to send a message to lesbians and gay men that "[w]e're really tired of you. We wish you'd go back into the closet." App. 136a, ¶ 13.

The effect of the exclusion on children. The Florida legislature took aim at gay adults, but those who have been most affected by this law are orphaned children.

For some children, the exclusion of a large class of eligible adults from the adoptive pool means they will be denied the possibility of ever being adopted into a permanent family. Others will spend even more of their childhood waiting. At the time this case was dismissed by the District Court, there were over 3,400 children in Florida eligible for adoption for whom there were no adoptive parents available. App. 149a, ¶ 15. Many wait for years: 36% of children in State custody in Florida are in foster care for more than four years; almost 80% wait more than two years. App. 149a, ¶ 16.

The Florida legislature is very much aware that it is in dire need of more adoptive parents for the thousands of children in State custody. *See* Fla. Stat. §§ 409.166 (difficult to find adoptive homes for older children, disabled children, and children of certain races); 409.1673(1)(a)(5) ("[t]here is a lack of permanent adoptive homes for older and disabled children."); 409.1755(2) ("[a] black child is more likely to . . . remain in permanent custody of the state because he or she is less likely to be adopted."). Florida has set up several programs to increase the pool of potential adoptive parents. *See, e.g.*, Fla. Stat. §§ 409.166 (subsidies for adopting "special needs" children"); 409.167 (statewide adoption exchange);

409.1755 (recruitment of adoptive parents for African American children); 409.401 (Interstate Compact on the Placement of Children to facilitate interstate adoption). Yet thousands of children still wait.

For other Florida children, the disqualification of eligible lesbian and gay applicants means they cannot be adopted by the persons best suited to become their parents. This is true, for example, for children who are already being raised by lesbian and gay foster parents, guardians, relatives and other caregivers. While these children, like plaintiffs John Doe and John Roe, are luckier than some because they have families, the law denies them the security that being adopted provides—the permanency the State recognizes is so important to children.[6] The experiences of John Doe and John Roe illustrate how the challenged law frustrates the State's goal of giving children a "permanent family life," Fla. Stat. § 63.022 (3), and in some cases, puts them at risk of being torn away from their families.

The plaintiff families

The Lofton family. Plaintiff John Roe is 13 years old. Plaintiff Steven Lofton and his partner of 20 years, Roger Croteau, have been raising him as their son since he was placed in foster care with Lofton as an infant.

Steven Lofton became a licensed foster parent in 1988 to take care of HIV+ infants who were abandoned. Over the years, he has been a foster parent to eight children who either had HIV or AIDS. Because caring for children with HIV is so demanding, the State of Florida insisted that Lofton give up

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[6] *See* App. 149a, ¶ 14 ("A primary purpose of Florida's adoption law is to provide all children who can benefit by it a permanent family life."); Fla. Stat. § 409.145 (under Florida law, a "permanent placement" is the goal for every child who cannot be reunified with birth parents); Fla. Stat. §§ 63.022(3); 39.001(3)(b).

his career as a pediatric AIDS nurse and devote full time to the children. App. 150a, ¶ 30; App. 142a.

Although some of the children Lofton parented were with him in temporary placements, four, all of whom he took in as infants, were not. Franke and Tracy are now 16 and 17 and still part of Lofton's family.[7] Ginger died of AIDS in 1994, when she was six. And then there is John. When John came home to live with Steven and Roger, he was a very sick baby; he tested positive for HIV and he had both cocaine and marijuana in his system. John's tests for HIV later turned negative. App. 150a, ¶ 31; App. 139a.

When he was three years old, the State then went through the process of terminating John's (but not his siblings') biological parents' parental rights, making him free to be adopted. App. 150a, ¶ 32. The State asked Lofton if he wanted to adopt John. He did, and he filed an adoption application. State child welfare officials wanted Lofton to adopt John, but his application was denied because of Fla. Stat. § 63.042(3). App. 150a, ¶¶ 32-34; Record 114 (Deposition of Steven Lofton, at 54-56, 60-61, 80-84).[8]

John, Franke and Tracy think of themselves as brothers and sister. They have lived virtually their entire lives with each other, and with Steven and Roger, who are the only parents they have ever had. App. 150a, ¶ 29; App. 142a, 143a; Record 145 (Declaration of Steven K. Lofton ("Lofton Dec."), ¶¶ 3-5, 7, 12.

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[7] These are the ages of the children now, adjusted from App. 142a for the passage of time.

[8] The Panel referred to a proposal by the State for Lofton to become John Doe's legal guardian. John Doe's guardian ad litem, counsel for the State, and Lofton all agreed that a guardianship would not be in John Doe's best interest because he would have lost his Medicaid coverage. App. 139a-140a.

In 1998, the Children's Home Society, the agency that placed the children with Lofton, created an award for outstanding foster parent of the year. The Society not only gave that first award to Steven Lofton and Roger Croteau, it named the honor the "Lofton-Croteau" award. App. 142a.

What Steven and Roger have given John might not seem very special. John goes to school every day and comes home to homework, chores and a family dinner. He is on the swim team. His friends come over and sometimes come along on family trips. Steven and Roger take care of him when he is sick and comfort him when he is upset. In short, John and his brother and sister lead lives fairly typical for American teenagers. Record 145 (Lofton Dec., ¶ 11).

But ordinary as this life might seem to some, it is an elusive dream to many Florida children who began life with the disadvantages John and his siblings had. So much so that even the judge who authored the Panel opinion felt compelled to write later that "one can only be impressed by the courage, tenacity and devotion" of Lofton for the children placed in his care. App. at 69a (Birch, J., concurring).

On June 22, 2001—after John had been with his family for ten years—Lofton received a phone call from John's State caseworker, who told him she was looking for someone else to adopt John. She asked Lofton if he knew anyone who might be interested. Lofton's lawyer immediately asked for the State's assurance that John would not be removed from his family. The State refused. App.137a-138a, ¶ ¶19-21; App. 151a, ¶¶ 40, 41.

The Houghton family. Plaintiff John Roe has been raised by plaintiff Doug Houghton for nearly 9 of his 13 years. Houghton is a critical care nurse. In 1994, while working at a pediatric clinic, he began seeing John as a patient. Record 112/113 (Deposition of Douglas E. Houghton, Jr. ("Houghton Dep.") (filed under seal), at 9-11,17-19).

Shortly before Christmas, 1995, when John was just shy of four, his biological father told Houghton that he was unable to take care of John, and asked Houghton to take him in. Houghton agreed, and he has been raising John ever since. Record 112/113 (Houghton Dep., at 21-22); App. 115a-116a; App. 150a, ¶ 27.

So that he could arrange for school and medical care, Houghton became John's legal guardian in March 1996. John's biological father has agreed to give up his legal status as a parent so that Houghton can adopt John. John's biological mother is dead. App. 150a, ¶ 27; App. 116a; Record 112/113 (Houghton Dep., at 24-26, 37).

According to the District Court, Houghton and John have a "deeply loving and interdependent relationship" and "emotional ties . . . as close as those between biological parents" and their children. App. 121a.[9]

Houghton had a favorable adoption home study in May 2000, but the evaluator concluded that by law, Houghton would not qualify to adopt John because Houghton is gay. App. 150a, ¶ 28.

The Smith/Skahen family. Plaintiffs Wayne LaRue Smith and Daniel Skahen have lived together in a committed relationship for eleven years. Record 52 (Amended Complaint, ¶ 27). Since this case was commenced, they have become long-term foster parents and seek to adopt a child who was placed in their permanent custody by the State. *See In the Interest of A.A.* (Fla. 16th Cir., No. DPK-00-340, Dec. 6, 2002), submitted to Eleventh Circuit pursuant to F.R.A.P. 28(j).

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[9] The District Court made the same findings about Lofton and John Doe. App. 121a.

Proceedings below

The plaintiff families filed a complaint in District Court seeking a declaration that Fla. Stat. § 63.042(3) violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. They charged that Florida's law violates the right to equal protection of lesbians and gay men who seek to adopt, and of children raised by lesbian and gay caregivers who cannot be adopted by them. The law, they say, is unconstitutional because it was enacted in order to disadvantage lesbians and gay men and it lacks even a rational relationship to any legitimate government interest. Lofton and his son, and Houghton and his son also say that the law is unconstitutional as applied to them because, by denying them the opportunity to secure their family relationships, it violates their right to family integrity.

The State moved for summary judgment, arguing that the statute was constitutional as a matter of law. It said it was possible rationally to think the exclusion could advance two State interests: 1) expressing moral disapproval of "homosexual households," and 2) promoting the best interests of children by placing them with married mothers and fathers, who it hypothesized make better parents. The State offered no evidence that gay people as a group are incapable of providing children with good homes, or that the purpose of the law was in fact to promote child welfare. Instead, it took the position that the federal Constitution allowed it to base the law on speculation.

The families responded that expressing disapproval is not a legitimate government interest. Moreover, they said, given the child welfare law and practice in Florida—the placement of children in long-term care with gay people, the fact that those known to pose a danger to children are not categorically excluded, the fact that the adoption statute allows single people to adopt and they do so in large numbers, and the lack

of any adoptive parents (let alone married couples) for so many Florida children who wait years for families—it is impossible to credit the idea that the adoption exclusion was enacted to promote children's welfare.

The District Court decision. The District Court agreed with the families that expressing moral disapproval is not a legitimate government interest. App. 127a-128a. But the court deemed the State's purpose to discriminate irrelevant since, it said, it is possible to hypothesize that the ban would promote the best interests of children by getting them placed with married heterosexual couples who "arguabl[y]" could provide a "more stable home environment, proper gender identification, and less social stigmatization." App. 129a-130a.

The Eleventh Circuit Panel decision. The plaintiff families appealed to the Eleventh Circuit. While the case was pending, this Court decided *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). The families filed supplemental briefs. *Lawrence*, they said, holds that like heterosexuals, gay people have a protected liberty interest in forming and maintaining intimate relationships. Because the State justified its law explicitly as a preference for those who form heterosexual relationships and against those who engage in same-sex intimacy, the families said, Florida's law must be subjected to the kind of "heightened scrutiny" weighing of interests this Court did in *Lawrence*. Any form of heightened scrutiny would be fatal, the families noted, since the State relied on hypothetical justifications rather than any facts, and because an actual purpose to express disapproval of gay people fails any level of review.

The Eleventh Circuit Panel deemed rational basis review the appropriate standard for reviewing the plaintiff families' equal protection claim because it said *Lawrence* was a rational basis case. App. 21a. The Panel said it was "particularly

hesitant" to say that *Lawrence* involved a protected liberty interest because the case generated "an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis." App. 19a-20a. Instead of the "careful description" of the liberty interest that the Panel said is one of the "primary features" of fundamental rights analysis, the *Lawrence* opinion invoked liberty interests "with sweeping generality." App. 20a-21a. The Panel also said *Lawrence* must be a rational basis case because the opinion did not demonstrate that America has a deeply rooted history and tradition of respecting a right to private sexual intimacy. App. 20a. Most significant to the Panel was the Court's holding, which it said was plainly based on "rational-basis grounds." App. 21a.

The Panel began its rational basis review by recharacterizing Florida's purpose to disapprove of "homosexual households" as an "interest in the promotion of public morality." App. 24a-25a. It said this Court had recently approved of that interest. App. 25a. The Panel did not consider it necessary to address the validity of that purpose since, it held, the adoption statute was rationally related to the goal of "furthering the best interests of adopted children by placing them in families with married mothers and fathers." App. 24a-25a. The Panel accepted what it admitted were the "unprovable assumptions" that married heterosexual couples are more stable, children benefit from the presence of a father and a mother, and thus, that such couples provide the "optimal family structure." App. 26a. The Panel said this is "the accumulated wisdom of several millennia of human experience." App. 26a.

Responding to the families' position that the categorical exclusion is irrational, the Panel pointed out that all parties agreed that substance abusers and child abusers, who are not categorically excluded from adopting, do not adopt if the State "determines" in individual evaluations that they pose an actual

threat to children. App. 28a. In the Panel's view, this meant plaintiffs had agreed there was no difference in treatment in fact.[10]

As for the fact that single heterosexuals are not excluded, the Panel speculated that they might eventually marry, and even if they don't, might be "better positioned . . . to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence," in part at least by sharing their own teenage dating experiences. App. 30a-31a.

The Panel assumed that the surplus of children waiting to be adopted might mean merely a delay in placement. App. 32a-33a. The Panel concluded that drawing the line at adoption, while otherwise placing children with gay people, is not irrational because foster care and guardianship do not have the "permanence" or the "societal, cultural, and legal significance" of adoption. App. 34a.

Perhaps attempting to supply some support for the speculation that gay people are categorically incapable of providing good homes, the Panel discussed some commentary on gay parents and the adjustment of their children, none of which the State relied upon or otherwise found its way into the record.[11] Summing up, the Panel said that it was not irrational

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[10] The Panel also pointed to a statute that bars some adoptions—of children who are in foster care—by people convicted of certain crimes. App. 28a-29a. But this statute does not apply to adoptions of other children. Fla. Stat. § 435.045; *see* Fla. Stat. § 63.202.

[11] Specifically, the Panel offered a "study" that it says shows that children of gay parents "fare differently on a number of measures, doing worse on some of them . . . ." App. 361-37a. But as the Panel was advised by an *amicus curiae* brief from the Child Welfare League of America, *et al.*, that article is the creation of Paul Cameron, whose work has been widely discredited and would not be admissible under Fed. R. Evid. 701 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). *See Baker v. Wade*,

for the legislature to "proceed with deliberate caution" before placing children in families "not conclusively demonstrated to be the equivalent to the marital family structure." App. 38a.

Finally, the Panel turned to *Romer v. Evans*, 517 U.S. 620 (1996), which it said involved a "unique factual situation and narrow holding" that made it inapplicable to this case. App. 39a. The Panel read *Romer* to protect against discrimination based on homosexual "status" but not "conduct." App. 39a.

The en banc *Court.* Plaintiffs' petition for *en banc* review was denied by a vote of 6-6.[12] Three of the six dissenters concluded that the statute violates the Equal Protection Clause, failing even rational basis review. App. 70a (Anderson and Dubina, JJ., dissenting); 71a-72a (Barkett, J., dissenting). Judge Barkett also concluded that this Court's *Lawrence* decision required heightened scrutiny, which the exclusion could not survive. App. 72a. The other three dissenters stopped short of stating their views on the statute's constitutionality. They would have granted *en banc* review because, in their view, "there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted

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106 F.R.D. 526, 536-37 (N.D. Tex. 1985) (describing Cameron's work on the effects of parental sexual orientation on children's development as a "total distortion" of the data), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

The only other article offered by the Panel, Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 Am. Soc. Rev. 159 (2001), concluded that "[b]ecause every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's 'best interest.'" *Id.* at 176.

[12] *See* note 2, *supra*.

felons or drug addicts from adopting." App. 112a (Marcus, J., dissenting (joined by Tjoflat, C.J., and Wilson, J.)).

Judge Barkett began her dissenting opinion by pointing out that the Florida statute burdens personal relationships and "exudes animus against a politically unpopular group," just like the challenged government acts in *Romer*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). App. 73a-74a. *See also Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring). Because the statutory scheme is "so riddled with exceptions" to placements with married mothers and fathers, Judge Barkett concluded that the purported purpose of providing married heterosexual couples cannot "reasonably be regarded as [the law's] aim." App. 77a (quoting *Eisenstadt*, 405 U.S. at 449).

Judge Barkett pointed out that the Panel did not explain why it is rational to believe that gay people are not able to provide stable, permanent homes or to be effective role models. She noted that there is no evidence to support either idea and the facts of this case suggest otherwise. App. 85a.

Observing that Florida allows "child abusers, terrorists, drug dealers, rapists and murderers" to apply to adopt, while categorically barring gay people, Judge Barkett wrote:

> Whereas the Texas sodomy statute struck down in *Lawrence* treated homosexuals as criminals, Florida's ban on gay adoption treats criminals with more dignity than homosexuals. Nothing more clearly raises the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," than this disparity of treatment.

App. 90a (quoting *Romer*, 517 U.S. at 634).

Judge Barkett summarized the legislative history of the adoption statute, which she said shows that in fact "anti-gay animus was the major factor—indeed the sole factor—behind the law's promulgation." App. 94a.[13]

Judge Barkett also disagreed with the Panel's interpretation of *Lawrence*. "The only way to avoid the conclusion that *Lawrence* recognized a fundamental right or liberty interest that requires heightened scrutiny," she concluded, "is to deliberately refuse to give meaning to the overwhelming bulk of the words, phrases, sentences, and paragraphs used in *Lawrence*. Under the Panel's view, *Lawrence* is a one-sentence opinion with pages and pages of irrelevant *dicta*." App. 107a. Because Florida punishes the exercise of this right by excluding gay people who have intimate relationships from consideration to be adoptive parents, the law should be subjected to heightened scrutiny, which it could not survive. App. 107a-111a.

Judge Birch, the author of the Panel opinion, wrote a special concurrence addressing Judge Barkett's dissent. In his view, *Lawrence* struck down the Texas sodomy statute without "announcing a new rule of constitutional law." App. 57a. Having separated the result in *Lawrence* from its broader principles, Judge Birch then concluded that the most "judicious" course was to limit its holding "to cases involving the same facts and permit the Supreme Court to clarify the gray areas it has apparently (and perhaps intentionally) left for another day." App. 60a.

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[13] As for the Panel's suggestion that public moral disapproval is a legitimate government interest, Judge Barkett noted that this directly conflicts with *Lawrence* and *Moreno*, 413 U.S. 528. App. 88a-89a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW BECAUSE WHETHER THE FOURTEENTH AMENDMENT PERMITS A STATE CATEGORICALLY TO EXCLUDE GAY PEOPLE FROM CONSIDERATION AS ADOPTIVE PARENTS IS AN IMPORTANT QUESTION OF FEDERAL LAW.

That two young boys, abandoned by those who conceived them and facing the grim prospect of bouncing from home to home in foster care, will be denied adoption by the courageous men who gave them real families, based on a law enacted to drive gay people "back into the closet," should be enough to warrant plenary review.

That over time thousands of children in Florida, similarly abandoned and similarly facing a bleak future in a broken foster care system, will be denied any real childhood so that Florida may use its adoption law to tell the world that it disapproves of gay people, is clearly sufficient reason to grant *certiorari*.

Moreover, review in this case is not only appropriate but necessary to preserve the primacy of this Court's constitutional decisions. At best, the Court of Appeals profoundly misread this Court's mandate in *Lawrence* and *Romer* that government may not enact laws in order to disadvantage gay people. In doing so, it has helped to create a blueprint for effectively undermining the significance of this Court's holdings in *Lawrence* and *Romer*, a process in which a growing number of other courts have joined.

A. The Panel and Other Courts Have Disregarded This Court's Rulings in *Lawrence* and *Romer* that Government May Not Pass Laws to Express Disapproval of Gay People.

The Court should grant review because the Panel's

decision is not simply wrong, but reflects an almost complete failure to absorb this Court's rulings in *Lawrence* and *Romer* that disapproval of gay people is not a constitutionally acceptable basis for government action. *Lawrence* and *Romer* were historic milestones in American constitutional law. The Court of Appeals did not simply fail to heed them. Instead, it took pains to explain them away in detail, to create a set of interpretations that would make their holdings narrow and limited to the peculiar facts of each decision. Worse still, the Panel's decision exemplifies an emerging pattern in the decisions of lower courts.

That minimizing interpretation of *Lawrence* and *Romer* does an injustice to the parents and children who are plaintiffs here and to the thousands of Florida children waiting in foster care for a permanent home. Equally important, it threatens to strip this Court's holdings of any principled meaning and deprive them of the significance that they rightfully deserve.

In *Romer v. Evans*, this Court struck down an amendment to the Colorado Constitution that barred the State and local governments from enacting any laws or policies that prohibited discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." 517 U.S. 620, 624 (1996) (quoting Colo. Const., Art. II, § 30(b)).

This Court held that, in addition to being "a denial of equal protection of the laws in the most literal sense," Amendment 2 violated even the "conventional and venerable" principle that "a law must bear a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635. As the Court explained, "'if the constitutional conception of 'equal protection of the law' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634 (quoting *United States Dep't*

of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (ellipses and italics in *Romer*)). Since the exclusion from civil rights protection was "inexplicable by anything but animus" toward gay men and lesbians, this Court held, it had no connection to a *legitimate* purpose.

Without a legitimate purpose, this Court held, the exclusion "classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else. This Colorado cannot do." *Id.*

Seven years later, this Court was faced with a Texas law that made some forms of sexual intimacy a crime for same-sex couples, but not for opposite-sex couples. *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). Texas said that it had passed the law to uphold its sense of "morality," a morality that obviously applied only to gay people.[14]

This Court could not have been more emphatic in its rejection of the Texas law and the state's attempted justification of it. The Texas law, like the Georgia law upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986), attempted to "control a personal relationship" that people have the liberty to choose "without being punished as criminals." *Lawrence*, 123 S. Ct. at 2478. The flaw in *Bowers*, this Court said, lay in its crabbed conception of the liberty at stake. The liberty protected by the Constitution allows individuals to choose to enter relationships with people of the same sex "and still retain their dignity as free persons." *Id.* at 2478. Gay people "are entitled to respect for their private lives." *Id.* at 2484.

This time using a Due Process analysis more demanding than the Equal Protection analysis used in *Romer*, this Court weighed Texas' law against the constitutional protection of

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[14] Brief of Respondent at 26-7, 42-8, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 470184.

those relationships and held the Texas law furthered no legitimate purpose that could "justify its intrusion into the personal and private life of the individual." *Id.* at 2478, 2484.

The Panel in this case went to extraordinary lengths to avoid the plain import of this Court's rulings in *Romer* and *Lawrence*.

Instead of heeding *Romer's* teaching that the purpose of rational basis review is to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law," *Romer*, 517 U.S. at 633, the Panel disregarded the undisputed record evidence that disadvantaging gay people was precisely the purpose of the law.

The Panel brushed aside Florida's own defense of the law as an expression of its disapproval of "homosexual households" by calling that purpose "an interest in promoting public morality," something it said this Court had recently approved. App. 24a-25a. The Panel thus ignored this Court's consistent rulings that a purpose to disadvantage a class of people, even if carried out in the name of morality, is not a legitimate purpose. *See Romer*, 517 U.S. at 634; *Moreno*, 413 U.S. at 534.

The Panel then held that it was entitled to accept as a "legitimate basis for legislative action" the "unprovable assumption" that gay people are, as a class, less capable than heterosexuals of providing stable homes and, as a class, less capable of giving children the education and guidance they need about intimate relationships. App. 26a. This "unprovable assumption" provides a rationale which, by assuming the incapacity of the disadvantaged group, incorporates the classification itself. Thus, the Panel ignored this Court's command that a classification can survive rational basis review only if it has a rational relationship to a purpose that is "independent" of the classification itself. *Romer*, 417 U.S. at 633; *Moreno*, 413 U.S. at 534-35.

Finally, the Panel virtually ignored the law's most glaring flaw: the complete absence of any explanation for Florida's categorical exclusion of gay people, whose parenting skills it trusts by giving them "de facto" permanent custody of children through foster care and guardianship, while permitting adoption by substance abusers and people who have committed domestic violence. A classification cannot survive rational basis review if it treats a class differently than those who are similarly situated in relevant respects. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Consequently, a classification cannot possibly stand if it treats a class less favorably than others who admittedly pose a far greater threat to the interest it is said to be attempting to advance. Moreover, this disparity carries a serious price. Gay people, whom the State shows it trusts by placing children with them in "permanent" foster care and guardianship, are kept from providing the State's least fortunate children with the thing they need most: permanent families. No one could think this was about child welfare. *See Romer*, 517 U.S. at 635.

As for the *Romer* decision itself, the Panel said its central holding was that Colorado's amendment was unconstitutional because of the "disjunction" between its "'[s]weeping and comprehensive' classification" and the "state's asserted bases for the classification." App. 38a-39a (quoting *Romer*, 517 U.S. at 624). Since Florida's law is not as sweeping, the Panel held, "*Romer's* unique factual situation and narrow holding are inapposite to this case." *Id.* It is true that in *Romer*, it was the disjunction between the classification and the state's justifications from which this Court inferred a state purpose to disadvantage gay people. But it was that purpose, and not the discontinuity itself, that violated the Constitution. And in this case, there is no need to *infer* such a purpose; a purpose to disadvantage gay people is shown by the record evidence, the legislative history, and the State's defense of the law.

The Panel's treatment of the *Lawrence* decision is even more startling. In *Lawrence*, this Court straightforwardly explained that it based its decision on the Due Process instead of the Equal Protection Clause because a narrower equality holding might not prevent future "discrimination both in the public and in the private spheres." 123 S. Ct. at 2482. Despite that, the Panel insisted that *Lawrence* is a narrow "rational basis" decision with little meaning outside of the "limited factual situation" it involved. App. 21a.

The Panel adopted the *Lawrence* dissent's division of all due process decisions into either "strict scrutiny" or "rational basis" cases, and then says that *Lawrence* must be a rational basis case since its "language and reasoning are inconsistent with standard fundamental rights analysis." App. 19a-20a; *see Lawrence*, 123 S. Ct at 2488 (Scalia, dissenting). But the opinion in *Lawrence* uses neither the language nor the kind of holding used in conventional "rational basis" review. Despite the claims of both the dissent and the Panel, this Court did not hold that the Texas law failed minimum scrutiny for lack of a legitimate purpose. It held instead that Texas had no legitimate interest that could ". . . justify its intrusion into the personal and private life of the individual," a weighing of the state's interest against the individual's that is inconsistent with rational basis review.

The language and the approach in *Lawrence* reflect this Court's more refined analytic framework for due process "protected liberty" that uses both "strict scrutiny" and "balancing" approaches depending on the individual interests and state purposes involved and the way both are implicated. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Sell v. United States*, 539 U.S. 166, 180-81 (2003); *Youngberg v. Romeo*, 457 U.S. 307, 320-22 (1982).

Again taking a cue from the *Lawrence* dissent, the Panel said that *Lawrence* had to be a rational basis case because it

did not ask if the right involved was deeply rooted in history, and did not provide a "careful description" of the right, both of which the Court typically does when it identifies a new liberty interest. App. 20a; *see Lawrence*, 123 S. Ct at 2491-92 (Scalia, dissenting). But this Court could not have been clearer that in *Lawrence* it was not announcing a "new right" but rather applying to gay people the well established *Griswold/Eisenstadt* right to private adult intimacy. In overruling *Bowers v. Hardwick*, this Court said that the analysis used by Justice Stevens in his *Bowers* dissent "should have been controlling in *Bowers* and should control here." *Id.* at 2484. That dissent relied on *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), the same autonomy cases which, along with *Casey*, 505 U.S. 833, this Court explicitly relied on in Lawrence. *See* 123 S. Ct. at 2476-81. And this Court typically neither performs a new "history and tradition" analysis nor confines itself to narrow descriptions when it applies an established right to a new situation. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000).

By failing to acknowledge that *Lawrence* simply applied a long-established right, the Panel found itself in the peculiar position of concluding that the "sweeping" terms this Court used to describe the liberty interest at stake in *Lawrence* meant the ruling, far from being "sweeping," was extremely narrow. App. 39a. That anomalous pronouncement is central to the Panel's decision. If the inclusive words of *Lawrence* mean what they say, and *Lawrence* requires heightened scrutiny of laws that disadvantage gay people because of their relationships, Florida's adoption exclusion must fail. For neither the State nor the Panel offered any evidence that in fact gay people are incapable of providing children with loving, stable homes. Perhaps more significant, neither the State nor the Panel could seriously dispute the evidence that the true purpose of the law was not to protect children, but to

send a message to gay people. Under heightened scrutiny, hypothetical purposes are not accepted and, as on rational basis review, a true purpose to disadvantage people is fatal. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Romer*, 517 U.S. at 633.

Some courts have faithfully followed this Court's rulings in *Lawrence* and *Romer*. *See, e.g., Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).[15] But the Panel is far from alone in paying them but casual regard.

The problem began the year after *Romer* with the Eleventh Circuit's *en banc* decision in *Shahar v. Bowers*, 114 F.3d 1097 (1997), *cert. den.*, 522 U.S. 1049 (1998). Ignoring the fact that the Colorado Amendment struck down in *Romer* applied to same-sex "conduct and relationships" as well as sexual orientation, the *Shahar* court said that *Romer's* "animus" holding did not apply because *Romer* was "about a person's condition" while *Shahar* was "about a person's conduct." 114 F.3d at 1110. Going on, *Shahar* made a mistake similar to the one the Panel made here. The court

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[15] In *Stemler*, 126 F.3d at 873, the Sixth Circuit held that under *Romer*, selective prosecution of a lesbian because of animus related to sexual orientation is a violation of the Equal Protection Clause. In *Weaver*, 29 F. Supp. 2d 1279, the court, applying *Romer*, held that a public school administrator's decision to fire a lesbian volleyball coach because of negative community reaction to her sexual orientation does not further a legitimate government interest and violated her right to equal protection. Similarly, in *Glover*, 20 F. Supp. 2d 1160, the court held that discrimination against a gay teacher motivated by anti-gay animus violates the right to equal protection. And in *Marcum*, 60 M.J. 198, 2004 WL 1885349, at *6, the Court of Appeals for the Armed Forces recognized that *Lawrence* required not rational basis review, but a "searching constitutional inquiry."

insisted that *Romer's* first holding—that the amendment's breadth amounted to a literal violation of equal protection—was its only holding, and that it therefore did not apply to a situation that had less than an "across-the-board denial of legal protection." *Shahar*, 114 F.3d at 1110. *Romer*, so the court put it, "is no employment case." *Id.*

Later that year, the Sixth Circuit decided *Equality Foundation v. Cincinnati*, 128 F.3d. 289 (6th Cir. 1997), *cert. den.*, 525 U.S. 943 (1998). Like the Panel here, the court in that case said that despite *Romer*, it is legitimate for government to discriminate against gay people in order to express its "moral disapproval of homosexuality." 128 F.3d at 300-301. Like the Eleventh Circuit, the court said that it was the "uniqueness" of the Colorado Amendment's "sweeping scope and effect" that made it invalid. *Id.* at 295, 297, 299.[16]

Earlier this year, the Kansas Court of Appeals followed the Eleventh Circuit's lead and suggested that *Romer* is only about "orientation" and therefore does not apply to state laws that treat same-sex sexual activity more severely than heterosexual activity. *Kansas v. Limon*, 32 Kan. App. 2d 369 (2004), *rev. granted* (Kan. May 25, 2004). Upholding a 17-year prison sentence for a teenager who had sex with another boy when he would have received no more than 15 months had his act been with a girl, the court took the same position as *Equality Foundation* and held that *Romer* permitted a state to treat gay teenagers differently to "protect the morals" of teenagers. *Id.* at 239-240.

The Panel here is also not the only court to say that *Lawrence* is effectively limited to its facts. The *Limon* court held that because *Lawrence* involved adults, it had no

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[16] The Sixth Circuit seems split internally over the meaning of *Romer*. *Compare Equality Foundation* with *Stemler v. City of Florence*, 126 F.3d at 873.

application to a case involving teenagers. *Id.* at 373-374. But this Court rested *Lawrence* on the same liberty it had upheld in *Carey*, 431 U.S. 678, and *Casey*, 505 U.S. 833, cases that held that while government has more leeway in regulating the lives of young adults, young adults do have a right to sexual autonomy.

And in *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), a case addressing the exclusion of same-sex couples from marriage, the Arizona Court of Appeals, like the Panel in this case, accepted the insistence of the *Lawrence* dissent that *Lawrence* is a minimum scrutiny "rational basis" case. The *Standhardt* ruling is somewhat gratuitous; the court had already found that the fundamental right to marry did not apply to same-sex couples. But by saying that "such an intimate expression of the bond securing a homosexual relationship" is not a protected liberty, *id.* at 457, the decision, like the Panel's here, is helping to create a jurisprudence that destroys the central meaning of what this Court did in *Lawrence* and *Romer*. *See also Williams v. Pryor*, 378 F.3d 1232 (11th Cir. 2004) (in context of challenge to law criminalizing the sale of sexual devices, court held that *Lawrence* is a rational basis case and inapplicable to those facts).

Clearly reaffirming this Court's rulings in *Lawrence* and *Romer* would not preordain the outcome in all cases involving laws that treat gay people differently. Some laws that treat gay people differently may not have been motivated by disapproval, and some may have actual purposes that are legitimate and important. As Justice Kennedy observed in *Board of Trustees v. Garrett,*

> The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal

Protection Clause.

531 U.S. 356, 375 (2001) (Kennedy, concurring). Reaffirming those holdings would, however, set the framework for deciding subsequent cases. Every case will have to evaluate the state's particular purpose. But every case should not have to litigate the proper analytic framework and standard of review.

When this Court said in *Romer* that "a bare desire to harm a politically unpopular minority is not a legitimate governmental purpose," its meaning should have been plain enough. "Classifications [may] not [be] drawn for the purpose of disadvantaging the group burdened by the law"; that rule of constitutional law applies to gay people just as it does to everyone else. Whatever the correct outcome should have been in *Equality Foundation, Shahar*, and *Limon*, their reasoning was incompatible with that central holding in *Romer*.

Lawrence itself, however, should have made the message unmistakable. *Lawrence* marked the end of the era in which the state could single out gay people for discrimination on the basis of nothing more than speculation. The decision in this case, and the opinions in *Limon*, *Standhardt* and *Williams* make it all too clear, however, that this Court's work here is unfinished.

At the very least, the diversity of views among the lower courts regarding the significance of *Lawrence* and *Romer* is an alternative basis for granting *certiorari*. *Compare Shahar*, 114 F.3d 1097; *Equality Foundation*, 128 F.3d 289; *Williams*, 378 F.3d 1232; *Limon*, 32 Kan. App. 2d 369; and *Standhardt*, 206 Ariz. 276, with *Stemler*, 126 F. 3d 856; *Weaver*, 29 F. Supp. 3d 1279; *Glover*, 20 F. Supp. 2d 1160; and *Marcum*, 60 M.J. 198, 2004 WL 1885349. *See* note 15, *supra*.

B. Florida's Use of its Adoption Law to Express Disapproval of Gay People Denies Many Florida Children Permanent Families.

What makes this case particularly appropriate for this Court's review is the cost the State of Florida is willing to pay for its statement disapproving of gay people, and the cost the Panel was willing to pay to allow it. This law sacrifices the interests of children—children who sometimes seem as abandoned by society as many of them were by those who created them. As the lives of the children who petition this Court today show, this is no abstract legal issue. As the striking number of children in Florida without families shows, this is not a problem with only parochial consequences.

Striking down this law is not a complete answer to Florida's central problem—that it has many more children in its care than it has adults willing to give them families. But it would help. And the damage here is qualitative as well as quantitative. It is no exaggeration to say that lives may be at stake here; childhoods certainly are. This Court should grant *certiorari* to make it clear once and for all that states may not pass laws to express their disapproval of gay people and most particularly may not do that on the backs of society's least fortunate.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*. In the alternative, if the Court grants review in *Miller v. United States*, No. 04-38, it should hold this case until it resolves the validity of intra-session appointments of Article III judges. *See* note 2, *supra*.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16723

D.C. Docket No. 99-10058-CV-JLK

STEVEN LOFTON, DOUGLAS HOUGHTON, TIMOTHY ACARO, next friend of John Doe and John Roe, WAYNE SMITH, DANIEL SKAHEN, JOHN DOE, JOHN ROE, minor children,

Plaintiffs-Appellants,

ANGELA GILMORE, et al.,

Plaintiffs,

versus

SECRETARY OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES, (formerly H.R.S.), DISTRICT ADMINISTRATOR, District XI of Florida Department of Children and Family Services,

Defendants-Appellees,

CHARLIE CRIST, Attorney General of the State of Florida,

Defendant,

ROBERT PAPPAS, District Administrator, District X of Florida Department of Children and Family Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 28, 2004)

Before BIRCH, CARNES and HUG*, Circuit Judges.

BIRCH, Circuit Judge:

In this appeal, we decide the states' rights issue of whether Florida Statute § 63.042(3), which prevents adoption by practicing homosexuals, is constitutional as enacted by the Florida legislature and as subsequently enforced. The district court granted summary judgment to Florida over an equal protection and due process challenge by homosexual persons desiring to adopt. We AFFIRM.

I. BACKGROUND

A. The Challenged Florida Statute

Since 1977, Florida's adoption law has contained a codified prohibition on adoption by any "homosexual" person. 1977 Fla. Laws, ch. 77-140, § 1, Fla. Stat. § 63.042(3) (2002).[1] For purposes of this statute, Florida courts have defined the term "homosexual" as being "limited to applicants who are known to engage in current, voluntary homosexual activity," thus drawing "a distinction between homosexual orientation and homosexual activity." *Fla. Dep't of Health & Rehab. Servs. v. Cox,* 627 So.2d 1210, 1215 (Fla.Dist.Ct.App.1993), *aff'd in relevant part,* 656 So.2d 902, 903 (Fla.1995). During the past twelve years, several legislative bills have attempted to repeal the statute,[2] and

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[1] Fla. Stat. § 63.042(3) provides: "No person eligible to adopt under this statute may adopt if that person is a homosexual."

[2] S.B. 752, Reg. Sess. (Fla.1995); H.B. 349, Reg. Sess. (Fla.1995); H.B. 1461, Reg. Sess. (Fla.1993).

three separate legal challenges to it have been filed in the Florida courts.[3] To date, no attempt to overturn the provision has succeeded. We now consider the most recent challenge to the statute.

B. The Litigants

Six plaintiffs-appellants bring this case. The first, Steven Lofton, is a registered pediatric nurse who has raised from infancy three Florida foster children, each of whom tested positive for HIV at birth. By all accounts, Lofton's efforts in caring for these children have been exemplary, and his story has been chronicled in dozens of news stories and editorials as well as on national television.[4] We confine our

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[3] *See Cox*, 627 So.2d at 1210, *aff'd in part, rev'd in part, and remanded*, 656 So.2d 902 (Fla.1995); *Amer v. Johnson*, 4 Fla. L. Weekly Supp. 854b (Fla.Cir.Ct.1997); *Seebol v. Farie*, 16 Fla. L. Weekly C52 (Fla.Cir.Ct.1991)

[4] *E.g.*, Jay Weaver, *Gays to Test Florida Law on Adoptions*, Miami Herald, March 4, 2003, at F1; *Advocates Say Keep Family at Center of Gay Adoption Battle*, Miami Times, Apr. 2, 2002, at 7A; Bruce Alpert, *Debate Over Ban on Gay Adoptions Grows*, Times-Picayune, Mar. 30, 2002, at Nat'l 1; Editorial, *Adoption by Loving Gay Parents*, St. Petersburg Times, Mar. 25, 2002, at 10A; Robert Scheer, Editorial, *Kids Get Left in the Lurch When the "Values" Cops Arrive*, L.A. Times, Mar. 19, 2002, at Metro 13; Dana Canedy, *Groups Fight Florida's Ban on Gay Adoptions*, N.Y. Times, Mar. 15, 2002, at A12; *Good Morning America: Steve Lofton and Roger Croteau Discuss Rights of Gay Couples to Adopt Children* (ABC television broadcast, Mar. 14, 2002); *World News Tonight with Peter Jennings: Gay Couple's Struggle to Adopt Foster Children in Florida* (ABC television broadcast, Mar. 14, 2002); *Primetime Thursday: Rosie's Story* (ABC television broadcast, Mar. 14, 2002); Julie Sullivan, *Oregon Family at Vortex of Ban on Gay Adoption*, Oregonian, Mar. 14, 2002, at A1; Jeanne Malmgren, *Gay Adoption in Florida: It's Out of the Question*, St. Petersburg Times, Mar. 14, 2002, at 1D; Andres Viglucci, *Parents in Their Hearts, They Seek Approval of the Law*, Miami Herald, Aug. 31, 2001, at 6A; Tamar Lewin, *Court Backs Florida Ban on Adoption by Gays*, N.Y. Times, Aug. 31, 2001, at A14; Gail Epstein Nieves, *Foster Parent Challenges State Ban on Gay Adoption*, Miami Herald, July 21, 2001, at 1B; David Crary, *Gay Adoption Ban in Florida Faces Court Test*, L.A. Times, June 17, 2001, at

discussion of that story to those facts relevant to the legal issues before us and properly before us in the record. John Doe, also named as a plaintiff-appellant in this litigation, was born on 29 April 1991. Testing positive at birth for HIV and cocaine, Doe immediately entered the Florida foster care system. Shortly thereafter, Children's Home Society, a private agency, placed Doe in foster care with Lofton, who has extensive experience treating HIV patients. At eighteen months, Doe sero-reverted and has since tested HIV negative. In September of 1994, Lofton filed an application to adopt Doe but refused to answer the application's inquiry about his sexual preference and also failed to disclose Roger Croteau, his cohabitating partner, as a member of his household. After Lofton refused requests from the Department of Children and Families ("DCF") to supply the missing information, his application was rejected pursuant to the homosexual adoption provision. Shortly thereafter, in early 1995, William E. Adams, Jr., a professor of law who had participated in one of the previous legal challenges to Fla. Stat. § 63.042(3), wrote to the American Civil Liberties Union ("ACLU") and informed it that Lofton and Croteau would make "excellent test plaintiffs." R3-108 at 3. Two years later, in light of the length of Doe's stay in Lofton's household, DCF offered Lofton the compromise of becoming Doe's legal guardian. This arrangement would have allowed Doe to leave the foster care system and DCF supervision. However, because it would have cost Lofton over $300 a month in lost foster care subsidies and would have jeopardized Doe's Medicaid coverage, Lofton declined the guardianship option unless it was an interim stage toward adoption. Under Florida law, DCF could not accommodate this condition, and the present litigation ensued.

A14; *All Things Considered: ACLU Plans Lawsuit Against Florida to Change a Law that Prohibits the Adoption of Children by Gay Men and Lesbians* (National Public Radio broadcast, May 26, 1999).

Plaintiff-appellant Douglas E. Houghton, Jr., is a clinical nurse specialist and legal guardian of plaintiff-appellant John Roe, who is eleven years old. Houghton has been Roe's caretaker since 1996 when Roe's biological father, suffering from alcohol abuse and frequent unemployment, voluntarily left Roe, then four years old, with Houghton. That same year, Houghton was appointed co-guardian of Roe along with one Robert Obeso (who otherwise has no involvement in this case). After Roe's biological father consented to termination of his parental rights, Houghton attempted to adopt Roe. Because of Houghton's homosexuality, however, he did not receive a favorable preliminary home study evaluation, which precluded him from filing the necessary adoption petition in state circuit court. Fla. Stat. §§ 63.092(3), 63.112(2)(b).

Plaintiff-appellants Wayne Larue Smith and Daniel Skahen, an attorney and real estate broker residing together in Key West, became licensed DCF foster parents after completing a requisite ten-week course in January of 2000. Since then, they have cared for three foster children, none of whom has been available for adoption. On 1 May 2000, Smith and Skahen submitted applications with DCF to serve as adoptive parents.[5] On their adoption applications, both Smith and Skahen indicated that they are homosexuals. On 15 May 2000, they received notices from DCF stating that their applications had been denied because of their homosexuality.

C. Procedural History

Appellants filed suit in the United States District Court for the Southern District of Florida and named as defendants Kathleen A. Kearney and Charles Auslander in

[5] Unlike Lofton and Houghton, neither of whose cohabitating partners seeks to join their respective adoptions, Smith and Skahen seek to adopt jointly.

their respective official capacities as DCF Secretary and DCF District Administrator for Dade and Monroe Counties. Their complaint alleged that the statute violates appellants' fundamental rights and the principles of equal protection. Jointly, appellants asked the district court to declare Fla. Stat. § 63.042(3) unconstitutional and to enjoin its enforcement. Appellants also sought class certification on behalf of two purported classes: all similarly situated adults and all similarly situated children. The district court denied the request for class certification and granted summary judgment in favor of the state on all counts, thereby upholding the statute. It is from this judgment that appellants now appeal.

Appellants assert three constitutional arguments on appeal. First, appellants argue that the statute violates Lofton, Houghton, Doe, and Roe's rights to familial privacy, intimate association, and family integrity under the Due Process Clause of the Fourteenth Amendment. Second, appellants argue that the Supreme Court's recent decision in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), recognized a fundamental right to private sexual intimacy and that the Florida statute, by disallowing adoption by individuals who engage in homosexual activity, impermissibly burdens the exercise of this right. Third, appellants allege that, by categorically prohibiting only homosexual persons from adopting children, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Each of these challenges raises questions of first impression in this circuit.

II. DISCUSSION

A. Summary Judgment Standard

We review a summary judgment decision *de novo* and apply the same legal standard used by the district court. *Nat'l Parks Conservation Ass'n v. Norton,* 324 F.3d 1229, 1236 (11th Cir.2003). In conducting our review, we view all

evidence and factual inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Only factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment. *Id.*

B. Florida's Adoption Scheme

Appellants' challenge cannot be viewed apart from the context in which it arises. Under Florida law, "adoption is not a right; it is a statutory privilege." *Cox,* 627 So.2d at 1216. Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state. *Cf. Smith v. Org. of Foster Families for Equal. & Reform,* 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977) (noting that, unlike the natural family, which has "its origins entirely apart from the power of the State," the foster parent-child relationship "has its source in state law and contractual arrangements"); *Lindley v. Sullivan,* 889 F.2d 124, 131 (7th Cir.1989) ("Because of its statutory basis, adoption differs from natural procreation in a most important and striking way.").

In formulating its adoption policies and procedures, the State of Florida acts in the protective and provisional role of *in loco parentis* for those children who, because of various circumstances, have become wards of the state. Thus, adoption law is unlike criminal law, for example, where the paramount substantive concern is not intruding on individuals' liberty interests, *see, e.g., Lawrence,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508; *Roe v. Wade,* 410

U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and the paramount procedural imperative is ensuring due process and fairness, *see, e.g., Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Adoption is also distinct from such contexts as government-benefit eligibility schemes or access to a public forum, where equality of treatment is the primary concern. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). By contrast, in the adoption context, the state's overriding interest is the best interests of the children whom it is seeking to place with adoptive families. *In re Adoption of H.Y.T.,* 458 So.2d 1127, 1128 (Fla.1984) (noting that, in Florida adoption proceedings, "the court's primary duty is to serve the best interests of the child--the object of the proceeding").[6] Florida, acting *parens patriae* for children who have lost their natural parents, bears the high duty of determining what adoptive home environments will best serve all aspects of the child's growth and development.

Because of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas. For example, Florida law requires that, in order to adopt any

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[6] *See also Rushing v. Bosse,* 652 So.2d 869, 873 (Fla.Dist.Ct.App.1995) ("Adoption proceedings are unique. In an adoption proceeding, the intended beneficiary of the proceeding is the child to be adopted."); *Amer,* 4 Fla. L. Weekly Supp. 854b (noting that persons seeking to adopt "are merely requesting that the state make a decision to investigate the candidate's background to determine if their environment would serve the best interests of a child" and that "[i]n each adoption proceeding, the child is the intended beneficiary whose interest is afforded the utmost consideration").

child other than a special needs child, an individual's primary residence and place of employment must be located in Florida. Fla. Stat. § 63.185. In screening adoption applicants, Florida considers such factors as physical and mental health, income and financial status, duration of marriage, housing, and neighborhood, among others. Fla. Admin. Code Ann. r. 65C-16.005(3) (2003). Similarly, Florida gives preference to candidates who demonstrate a commitment to "value, respect, appreciate, and educate the child regarding his or her racial and ethnic heritage." *Id.* Moreover, prospective adoptive parents are required to sign an affidavit of good moral character. *Id.* Many of these preferences and requirements, if employed outside the adoption arena, would be unlikely to withstand constitutional scrutiny. *See, e.g., Troxel v. Granville,* 530 U.S. 57, 68, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000) (recognizing that, absent neglect or abuse, the state may not "inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children"); *Supreme Court of Va. v. Friedman,* 487 U.S. 59, 70, 108 S.Ct. 2260, 2267, 101 L.Ed.2d 56 (1988) (invalidating as unconstitutional Virginia's residency requirement for waive-in admission to the state bar).

The decision to adopt a child is not a private one, but a public act. *Cox,* 627 So.2d at 1216. At a minimum, would-be adoptive parents are asking the state to confer official recognition--and, consequently, the highest level of constitutional insulation from subsequent state interference, *see Troxel,* 530 U.S. at 65, 120 S.Ct. at 2060--on a relationship where there exists no natural filial bond. In many cases, they also are asking the state to entrust into their permanent care a child for whom the state is currently serving as *in loco parentis*. In doing so, these prospective adoptive parents are electing to open their homes and their

private lives to close scrutiny by the state.[7] Florida's adoption application requires information on a variety of private matters, including an applicant's physical and psychiatric medical history, previous marriages, arrest record, financial status, and educational history. In this regard, Florida's adoption scheme is like any "complex social welfare system that necessarily deals with the intimacies of family life." *Bowen v. Gilliard,* 483 U.S. 587, 602, 107 S.Ct. 3008, 3017-18, 97 L.Ed.2d 485 (1987) (quoting *Califano v. Jobst,* 434 U.S. 47, 55 n. 11, 98 S.Ct. 95, 100 n. 11, 54 L.Ed.2d 228 (1977)). Accordingly, such intrusions into private family matters are on a different constitutional plane than those that "seek[ ] to foist orthodoxy on the unwilling by banning or criminally prosecuting" nonconformity. *Califano,* 434 U.S. at 55 n. 11, 98 S.Ct. at 100 n. 11; *cf. Lindley,* 889 F.2d at 131 (declining to find a privacy interest in adopting a child because state law "requires adopters to submit their personal lives to intensive scrutiny before the adoption may be approved").

In short, a person who seeks to adopt is asking the state to conduct an examination into his or her background and to make a determination as to the best interests of a child in need of adoption. In doing so, the state's overriding interest is not providing individuals the opportunity to become parents, but rather identifying those individuals whom it deems most capable of parenting adoptive children and providing them with a secure family environment.

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[7] *See also Cox,* 627 So.2d at 1216 ("To make decisions that accord with the best interests of children, government agencies and courts are clearly entitled to conduct extensive examinations into the background of prospective parents."); *In re Op. of the Justices,* 129 N.H. 290, 530 A.2d 21, 27 (1987) ("[W]e note that no intrusion by the state in this context is possible unless and until an individual invites it by voluntarily seeking to adopt.... Only then would the state pose questions about the individual's private life, as the agent responsible for preserving and furthering the welfare of its children.").

Indicative of the strength of the state's interest--indeed duty--in this context is the fact that appellants have not cited to us, nor have we found, a single precedent in which the Supreme Court or one of our sister circuits has sustained a constitutional challenge to an adoption scheme or practice by any individual other than a natural parent, and even many challenges by natural parents have failed. *See, e.g., Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). Of course, despite their highly sensitive nature, adoption schemes are by no means immune from constitutional scrutiny, and we now consider the constitutionality of the Florida statute. *See, e.g., Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) (invalidating on equal protection grounds a state law permitting unwed mothers, but not unwed fathers, to block adoption of their child simply by withholding consent).

C. Appellants' Due Process Challenges

1. Fundamental Right to "Family Integrity"

Neither party disputes that there is no fundamental right to adopt, nor any fundamental right to be adopted. R4-124 at 10 (Joint Pre-trial Stipulation); *see also Mullins v. Oregon,* 57 F.3d 789, 794 (9th Cir.1995) ("[W]hatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest."); *Lindley,* 889 F.2d at 131 ("[W]e are constrained to conclude that there is no fundamental right to adopt."). Both parties likewise agree that adoption is a privilege created by statute and not by common law. R4-124 at 10. Because there is no fundamental right to adopt or to be adopted, it follows that there can be no fundamental right to apply for adoption.

Nevertheless, appellants argue that, by prohibiting homosexual adoption, the state is refusing to recognize and protect constitutionally protected parent-child relationships

between Lofton and Doe and between Houghton and Roe.[8] Noting that the Supreme Court has identified "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court," *Troxel,* 530 U.S. at 65, 120 S.Ct. at 2060, appellants argue that they are entitled to a similar constitutional liberty interest because they share deeply loving emotional bonds that are as close as those between a natural parent and child.[9] They further contend that this liberty interest is significantly burdened by the Florida statute, which prevents them from obtaining permanency in their relationships and creates uncertainty about the future integrity of their families. Only by being given the opportunity to adopt, appellants assert, will they be able to protect their alleged right to "family integrity."[10]

Although the text of the Constitution contains no reference to familial or parental rights, Supreme Court precedent has long recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66, 120 S.Ct. at 2060. A corollary to this right is the "private realm of family life

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[8] Because Smith and Skahen have no specific foster child or legal ward whom they are seeking to adopt, they do not, and need not, join in these arguments.

[9] On appeal, appellants argue that the district court erred in not allowing them to show that they have a constitutionally protected family relationship. The shortcoming in appellants' argument, however, is not factual, but legal. As we explain, appellants' emotional ties, regardless how strong and intense, do not by themselves create the constitutional rights appellants claim to have.

[10] As part of this argument, appellants assert that the state is denying them access to the panoply of constitutional and statutory protections that accompany legal adoption solely on the basis of their homosexuality. This is a restatement of their equal protection argument, which we address in Section II.D.

which the state cannot enter that has been afforded both substantive and procedural protection." *Smith v. Org. of Foster Families for Equal. & Reform,* 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14 (1977) (internal citation and quotation marks omitted). Historically, the Court's family and parental-rights holdings have involved biological families. *See, e.g., Troxel,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). The Court itself has noted that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Smith,* 431 U.S. at 843, 97 S.Ct. at 2109. Appellants, however, seize on a few lines of *dicta* from *Smith,* in which the Court acknowledged that "biological relationships are not [the] exclusive determination of the existence of a family," *id.,* and noted that "[a]doption, for instance, is recognized as the legal equivalent of biological parenthood," *id.* at 844 n. 51, 97 S.Ct. at 2109 & n. 51. Extrapolating from *Smith,* appellants argue that parental and familial rights should be extended to individuals such as foster parents and legal guardians and that the touchstone of this liberty interest is not biological ties or official legal recognition, but the emotional bond that develops between and among individuals as a result of shared daily life.

We do not read *Smith* so broadly. In *Smith,* the Court considered whether the appellee foster families possessed a constitutional liberty interest in "the integrity of their family unit" such that the state could not disrupt the families without procedural due process. *Id.* at 842, 97 S.Ct. at 2108. Although the Court found it unnecessary to resolve that question, Justice Brennan, writing for the majority, did note

that the importance of familial relationships stems not merely from blood relationships, but also from "the emotional attachments that derive from the intimacy of daily association." *Id.* at 844, 97 S.Ct. at 2109. The *Smith* Court went on, however, to discuss the "important distinctions between the foster family and the natural family," particularly the fact that foster families have their genesis in state law. *Id.* at 845, 97 S.Ct. at 2110. The Court stressed that the parameters of whatever potential liberty interest such families might possess would be defined by state law and the justifiable expectations it created. *Id.* at 845-46, 97 S.Ct. at 2110. The Court found that the expectations created by New York law--which accorded only limited recognition to foster families--supported only "the most limited constitutional 'liberty' in the foster family." *Id.* at 846, 97 S.Ct. at 2110. Basing its holding on other grounds, the Court concluded that the procedures provided under New York law were "adequate to protect whatever liberty interest appellees may have." *Id.* at 856, 97 S.Ct. at 2115.

In *Drummond v. Fulton County Dep't of Family & Children's Servs.*, the former Fifth Circuit construed *Smith*'s *dicta* in considering due process and equal protection claims brought by white foster parents challenging Georgia's refusal to permit them to adopt their mixed-race foster child, whom they had parented for two years. 563 F.2d 1200, 1206 (5th Cir.1977) (en banc), *cert. denied,* 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1141 (1978).[11] Arguing that theirs was a "psychological family," the foster parents advanced a theory identical to that of present appellants:

> Plaintiffs maintain that during the period Timmy lived with them mutual feelings of love and dependence developed which are

[11] In *Bonner v. Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to 1 October 1981.

> analogous to those found in most biological families. By so characterizing their home situation they seek to come within the protection which courts have afforded to the family unit. They assert that their relationship to Timmy is part of the familial right to privacy which is a protected interest under the Fourteenth Amendment. As the "psychological parents" of Timmy, they claim entitlement to the parental rights referred to in numerous decisions.

Id. at 1206 (internal citation omitted). Relying on *Smith,* the *Drummond* court rejected plaintiffs' argument. Examining state law to determine the extent of plaintiffs' constitutional interests, the court found that "[t]here is no basis in the Georgia law, which creates the foster relationship, for a justifiable expectation that the relationship will be left undisturbed." *Id.* at 1207. The *Drummond* court stated:

> The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it.

Id.; *accord Mullins,* 57 F.3d at 794 (holding that biological grandparents possessed no liberty interest in adopting two of their grandchildren who were available for adoption); *Procopio v. Johnson,* 994 F.2d 325, 329 (7th Cir.1993) (relying on *Smith* and holding that "[n]otwithstanding the preference that state law grants to foster families seeking to adopt their foster children, this priority does not rise to the level of an entitlement or expectancy").

Neither *Smith* nor *Drummond,* however, categorically foreclosed the possibility that, under exceptional

circumstances, a foster family could possess some degree of constitutional protection if state law created a "justifiable expectation" of family unit permanency. *Drummond,* 563 F.2d at 1207. Here, we find that under Florida law neither a foster parent nor a legal guardian could have a justifiable expectation of a permanent relationship with his or her child free from state oversight or intervention. Under Florida law, foster care is designed to be a short-term arrangement while the state attempts to find a permanent adoptive home.[12] For instance, Florida law permits foster care as a "permanency option" only for children at least fourteen years of age, Fla. Stat. § 39.623(1), and DCF may remove a foster child anytime that it believes it to be in the child's best interests, *id.* § 409.165(3)(f). Similarly, legal guardians in Florida are subject to ongoing judicial oversight, including the duty to file annual guardianship reports and annual review by the appointing court, *id.* §§ 744.361-372, and can be removed for a wide variety of reasons, *id.* § 744.474 (permitting removal of a guardian for such causes as incapacity, illness, substance abuse, conviction of a felony, failure to file annual guardianship reports, and failure to fulfill guardianship education requirements). In both cases, the state is not interfering with natural family units that exist independent of its power, but is regulating ones created by it. Lofton and Houghton entered into relationships to be a foster parent and legal guardian, respectively, with an implicit understanding that these relationships would not be immune from state oversight and would be permitted to continue only upon state

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[12] Although there are undoubtedly situations in which foster care becomes a permanent placement, "it is hard to 'believe that such breakdowns of the ... system must be protected or forever frozen in their existence by the Due Process Clause of the Fourteenth Amendment.' " *Drummond v. Fulton County Dep't of Family & Children's Servs.,* 563 F.2d 1200, 1207 (5th Cir.1977) (quoting *Smith v. Org. of Foster Families for Equal. & Reform,* 431 U.S. 816, 862, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring)).

approval. The emotional connections between Lofton and his foster child and between Houghton and his ward originate in arrangements that have been subject to state oversight from the outset. We conclude that Lofton, Doe, Houghton, and Roe could have no justifiable expectation of permanency in their relationships. Nor could Lofton and Houghton have developed expectations that they would be allowed to adopt, in light of the adoption provision itself.

Even if Florida law did create an expectation of permanency, appellants misconstrue the nature of the liberty interest that it would confer upon them. The resulting liberty interest at most would provide *procedural* due process protection in the event the state were to attempt to remove Doe or Roe. *See Smith,* 431 U.S. at 845, 97 S.Ct. at 2110 (considering whether foster families' asserted liberty interest in remaining intact warranted greater procedural safeguards than were currently provided under New York law); *Drummond,* 563 F.2d at 1204 (considering, if foster family possesses constitutional rights, "how much procedural protection is required in order to safeguard them?"). Such a procedural right does not translate, however, into a substantive right to be free from state inference. Nor does it create an affirmative right to be accorded official recognition as "parent" and "child." *Cf. Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (holding that the government's refusal to subsidize the exercise of a constitutional right does not constitute a violation of that right); *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (same); *Mullins,* 57 F.3d at 794 ("A negative right to be free of governmental interference in an already existing familial relationship does not translate into an affirmative right to create an entirely new family unit out of whole cloth."). In sum, Florida's statute by itself poses no threat to whatever hypothetical constitutional protection foster families and guardian-ward relationships may possess.

We conclude that appellants' right-to-family-integrity argument fails to state a claim. There is no precedent for appellants' novel proposition that long-term foster care arrangements and guardianships are entitled to constitutional protection akin to that accorded to natural and adoptive families. Moreover, we decline appellants' invitation to recognize a new fundamental right to family integrity for groups of individuals who have formed deeply loving and interdependent relationships. Under appellants' theory, any collection of individuals living together and enjoying strong emotional bonds could claim a right to legal recognition of their family unit, and every removal of a child from a long-term foster care placement--or simply the state's failure to give long-term foster parents the opportunity to adopt--would give rise to a constitutional claim. Such an expansion of the venerable right of parental control would well exceed our judicial mandate as a lower federal court. *See Collins v. City of Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (noting that the doctrine of judicial restraint requires even the Supreme Court to exercise "the utmost care" whenever asked to break new ground in the field of fundamental rights).

2. Fundamental Right to "Private Sexual Intimacy"

Laws that burden the exercise of a fundamental right require strict scrutiny and are sustained only if narrowly tailored to further a compelling government interest. *See, e.g., Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 618 (1978); *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). Appellants argue that the Supreme Court's recent decision in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), which struck down Texas's sodomy statute, identified a hitherto unarticulated fundamental right to private sexual intimacy. They contend that the Florida statute, by disallowing adoption to any individual who

chooses to engage in homosexual conduct, impermissibly burdens the exercise of this right.

We begin with the threshold question of whether *Lawrence* identified a new fundamental right to private sexual intimacy. *Lawrence*'s holding was that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct. The effect of this holding was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct. 123 S.Ct. at 2478. Nowhere, however, did the Court characterize this right as "fundamental." *Cf. id.* at 2488 (Scalia, J., dissenting) (observing that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause"). Nor did the Court locate this right directly in the Constitution, but instead treated it as the by-product of several different constitutional principles and liberty interests.[13]

We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-

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[13] The Court's language suggested that this right emerges from the confluence of several factors, namely, (1) the broad concepts of liberty located in the Due Process Clause, *see, e.g., Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 2475 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *id.* ("The instant case involves liberty of the person both in its spatial and more transcendent dimensions."); *id.* at 2484 ("[T]here is a realm of personal liberty which the government may not enter.") (citation omitted); (2) a cluster of specific constitutional rights closely *related* to sexual intimacy, *id.* at 2481 (noting the constitutional protection of decisions relating to sexual intimacy, including rights involving "marriage, procreation, contraception, family relationships, child rearing, and education"); and (3) Texas's failure to offer a rational basis for its statute, *id.* at 2484 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

rights analysis. The Court has noted that it must "exercise the utmost care whenever [it is] asked to break new ground" in the field of fundamental rights, *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997) (citation omitted), which is precisely what the *Lawrence* petitioners and their *amici curiae* had asked the Court to do.[14] That the Court declined the invitation is apparent from the absence of the "two primary features" of fundamental-rights analysis in its opinion. *Glucksberg,* 521 U.S. at 720, 117 S.Ct. at 2268. First, the *Lawrence* opinion contains virtually no inquiry into the question of whether the petitioners' asserted right is one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21, 117 S.Ct. at 2268 (internal citations and quotation marks omitted).[15] Second, the opinion notably never provides the " 'careful description' of the asserted fundamental liberty interest" that is to accompany fundamental-rights analysis. *Id.* at 721, 117 S.Ct. at 2268 (citation omitted); *see also Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993) (" 'Substantive due process' analysis must begin with a careful description of the asserted right...."). Rather, the constitutional liberty interests on which the Court relied were invoked, not with "careful description," but with sweeping

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[14] *See* Tr. of Oral Argument, No. 02-102, at *4; Br. of the ACLU et al. as *Amici Curiae,* No. 02-102, at *11-25.

[15] The Court did devote considerable attention to history and tradition. This examination, however, was for the purpose of challenging the historical premises relied upon by the *Bowers* Court, and it focused on whether there has been a history of enacting, and regularly enforcing, laws specifically directed at private homosexual conduct. *Lawrence,* 123 S.Ct. at 2478-81. Notably absent from this discussion was the critical inquiry for purposes of fundamental-rights analysis: whether there has been a deeply rooted tradition and history of *protecting* the right to homosexual sodomy or the right to private sexual intimacy.

generality. *See, e.g., Lawrence,* 123 S.Ct. at 2475 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *id.* ("The instant case involves liberty of the person both in its spatial and more transcendent dimensions."); *id.* at 2484 ("[T]here is a realm of personal liberty which the government may not enter.") (citation omitted). Most significant, however, is the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds, holding that it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 2484; *see also id.* at 2488 (Scalia, J., dissenting) (observing that the majority opinion did not "subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right' ").

We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right. Accordingly, we need not resolve the second prong of appellants' fundamental-rights argument: whether exclusion from the statutory privilege of adoption because of appellants' sexual conduct creates an impermissible burden on the exercise of their asserted right to private sexual intimacy. *Cf. Lyng v. Castillo,* 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527 (1986) (only classifications that " 'directly and substantially' interfere" with a fundamental right constitute an impermissible "burden") (citation omitted).

Moreover, the holding of *Lawrence* does not control the present case. Apart from the shared homosexuality component, there are marked differences in the facts of the two cases. The Court itself stressed the limited factual situation it was addressing in *Lawrence*:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Lawrence, 123 S.Ct. at 2484. Here, the involved actors are not only consenting adults, but minors as well. The relevant state action is not criminal prohibition, but grant of a statutory privilege. And the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition. Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.

D. Appellants' Equal Protection Challenge

1. Rational-Basis Review

The Equal Protection Clause of the Fourteenth Amendment proclaims that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV, § 1. The central mandate of the equal protection guarantee is that "[t]he sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson,* 463 U.S. 248, 265, 103 S.Ct. 2985, 2995, 77 L.Ed.2d 614 (1983). Equal protection, however, does not forbid legislative classifications. *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). "It simply keeps governmental

decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* Unless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996). As we have explained, Florida's statute burdens no fundamental rights. Moreover, all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.[16] Because the present case involves neither a fundamental right nor a suspect class, we review the Florida statute under the rational-basis standard.

Rational-basis review, "a paradigm of judicial restraint," does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-14, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) (citation omitted). The question is simply whether the challenged legislation is rationally related to a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). Under this deferential standard, a legislative classification "is accorded a strong presumption of validity," *id.* at 319, 113 S.Ct. at 2642, and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis

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[16] *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir.1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir.1997); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir.1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.1996); *Steffan v. Perry*, 41 F.3d 677 (D.C.Cir.1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989); *Woodward v. United States*, 871 F.2d 1068 (Fed.Cir.1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir.1984); *Rich v. Sec'y of the Army*, 735 F.2d 1220 (10th Cir.1984).

for the classification," *id.* at 320, 113 S.Ct. at 2642 (citation omitted). This holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer,* 517 U.S. at 632, 116 S.Ct. at 1627. Moreover, a state has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller,* 509 U.S. at 320, 113 S.Ct. at 2643. Rather, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 320-21, 113 S.Ct. at 2643 (citation omitted).

2. Florida's Asserted Rational Bases

Cognizant of the narrow parameters of our review, we now analyze the challenged Florida law. Florida contends that the statute is only one aspect of its broader adoption policy, which is designed to create adoptive homes that resemble the nuclear family as closely as possible. Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida asserts, provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling. Florida argues that disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida's interest in promoting adoption by marital families.[17]

[17] Florida also asserts that the statute is rationally related to its interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded

Florida clearly has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children. *See, e.g., Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."); *Stanley,* 405 U.S. at 652, 92 S.Ct. at 1213 (noting that "protect [ing] the moral, emotional, mental, and physical welfare of the minor" is a "legitimate interest[ ], well within the power of the State to implement") (internal quotation marks omitted). It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character, and personality for years to come. In time, children grow up to become full members of society, which they in turn influence, whether for good or ill. The adage that "the hand that rocks the cradle

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legal recognition as families. Appellants respond that public morality cannot serve as a legitimate state interest. Because of our conclusion that Florida's interest in promoting married-couple adoption provides a rational basis, it is unnecessary for us to resolve the question. We do note, however, the Supreme Court's conclusion that there is not only a legitimate interest, but "a substantial government interest in protecting order and morality," *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991), and its observation that "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia,* 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976) (plurality opinion) (citation omitted). We also note that our own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest. *See, e.g., Williams v. Pryor,* 240 F.3d 944, 949 (11th Cir.2001) ("The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."); *see also id.* at 949 n. 3 ("In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases.").

rules the world" hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children. It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society--particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.

More importantly for present purposes, the state has a legitimate interest in encouraging this optimal family structure by seeking to place adoptive children in homes that have both a mother and father. Florida argues that its preference for adoptive marital families is based on the premise that the marital family structure is more stable than other household arrangements and that children benefit from the presence of both a father and mother in the home. Given that appellants have offered no competent evidence to the contrary, we find this premise to be one of those "unprovable assumptions" that nevertheless can provide a legitimate basis for legislative action. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 62-63, 93 S.Ct. 2628, 2638, 37 L.Ed.2d 446 (1973). Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model. *See, e.g.,* Plato, *The Republic,* Bk. V, 459d-461e; Simone de Beauvoir, *The Second Sex* (H.M. Parshley trans., Vintage Books 1989) (1949). Against this "sum of experience," it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother. *Paris Adult Theatre I,* 413 U.S. at 63, 93 S.Ct. at 2638.

3. Appellants' Arguments

Appellants offer little to dispute whether Florida's preference for marital adoptive families is a legitimate state interest. Instead, they maintain that the statute is not rationally related to this interest. Arguing that the statute is both overinclusive and underinclusive, appellants contend that the real motivation behind the statute cannot be the best interest of adoptive children.

In evaluating this argument, we note from the outset that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications,* 508 U.S. at 315, 113 S.Ct. at 2102; *see also City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.") (citation omitted). Instead, the question before us is whether the Florida legislature *could* have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions. *See Panama City Med. Diagnostic Ltd. v. Williams,* 13 F.3d 1541, 1545 (11th Cir.1994) ("The task is to determine if any set of facts may be reasonably conceived of to justify the legislation."). Unless appellants' evidence, which we view on summary judgment review in the light most favorable to appellants, can negate every plausible rational connection between the statute and Florida's interest in the welfare of its children, we are compelled to uphold the statute. *See Vance v. Bradley,* 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979) ("In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be

true by the governmental decisionmaker."). We turn now to appellants' specific arguments.

a. Adoption by Unmarried Heterosexual Persons

Appellants note that Florida law permits adoption by unmarried individuals and that, among children coming out the Florida foster care system, 25% of adoptions are to parents who are currently single. Their argument is that homosexual persons are similarly situated to unmarried persons with regard to Florida's asserted interest in promoting married-couple adoption. According to appellants, this disparate treatment lacks a rational basis and, therefore, disproves any rational connection between the statute and Florida's asserted interest in promoting adoption into married homes. Citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), appellants argue that the state has not satisfied *Cleburne*'s threshold requirement that it demonstrate that homosexuals pose a unique threat to children that others similarly situated in relevant respects do not.[18]

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[18] Appellants also point to the fact that, in addition to single parents, substance abusers and perpetrators of domestic violence are not *categorically* excluded from adopting under Florida law. Appellants, however, have offered no evidence that such individuals are in reality ever permitted to adopt in Florida and actually have stipulated to the contrary. Appellants stipulated pre-trial that "[p]ersons with substance abuse problems are excluded from adopting children in Florida if it is determined that the abuse threatens the child." R4-124 at 4. Likewise, appellants stipulated that Florida law categorically excludes from adopting children those convicted of certain crimes of domestic violence. *See id.* Moreover, Florida law bars foster care and adoptive placement by DCF

> 1. In any case in which a record check reveals a felony conviction for child abuse, abandonment, or neglect; for spousal abuse; for a crime against children, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide but not including other physical assault or battery, if the department finds that a

We find appellants' reading of *Cleburne* to be an unwarranted interpretation. In *Cleburne,* the Supreme Court invalidated under the rational-basis test a municipal zoning ordinance requiring a group home for the mentally retarded to obtain a special use permit. *Id.* at 435, 105 S.Ct. at 3252. The municipality argued that it had a legitimate interest in (1) protecting the residents of the home from a nearby flood plain, (2) limiting potential liability for acts of residents of the home, (3) maintaining low-density land uses in the neighborhood, (4) reducing congestion in neighborhood streets, and (5) avoiding fire hazards. *Id.* at 449-50, 105 S.Ct. at 3259- 60. The Court, however, found that the municipality failed to distinguish how these concerns applied particularly to mentally retarded residents of the home and not to a number of other persons who could freely occupy the identical structure without a permit, such as boarding houses, fraternity houses, and nursing homes. *Id.* The Court concluded that the purported justifications for the ordinance made no sense in light of how it treated other groups similarly situated. *Id.* at 450, 105 S.Ct. at 3260. Appellants have overstated *Cleburne*'s holding by asserting that it places a burden on the State of Florida to show that homosexuals pose a greater threat than other unmarried adults who are allowed to adopt. The *Cleburne* Court reasserted the unremarkable principle that, when a statute imposes a classification on a particular group, its failure to impose the same classification on "other groups similarly situated in relevant respects" can be probative of a lack of a rational basis. *Bd. of Trustees of the Univ. of Alabama v. Garrett,* 531

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court of competent jurisdiction has determined that the felony was committed at any time; and

2. In any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if the department finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years. Fla. Stat. § 435.045(1)(a).

U.S. 356, 366 n. 4, 121 S.Ct. 955, 963 n. 4, 148 L.Ed.2d 866 (2001) (explaining *Cleburne*'s rationale); *see also Nordlinger,* 505 U.S. at 10, 112 S.Ct. at 2331 (noting that disparate treatment is permissible unless differently treated classes "are in *all* relevant respects alike") (emphasis added).

This case is distinguishable from *Cleburne*. The Florida legislature could rationally conclude that homosexuals and heterosexual singles are not "similarly situated in relevant respects." It is not irrational to think that heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment. Moreover, as the state noted, the legislature could rationally act on the theory that heterosexual singles, even if they never marry, are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence.[19] In a previous challenge to Florida's statute, a Florida appellate court observed:

> [W]hatever causes a person to become a homosexual, it is clear that the state cannot know the sexual preferences that a child will exhibit as an adult. Statistically, the state does know that a very high percentage of children

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[19] The New Hampshire Supreme Court, in considering the constitutionality of a similar prohibition on homosexual adoption, concluded that the prohibition was rationally related to the state's desire "to provide appropriate role models for children" in the development of their sexual and gender identities. *In re Op. of the Justices,* 129 N.H. 290, 530 A.2d 21, 25 (1987). That court noted that "the source of sexual orientation is still inadequately understood and is thought to be a combination of genetic and environmental influences. Given the reasonable possibility of environmental influences, we believe that the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity." *Id.* (citation omitted).

> available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect that parents will provide this education to teenagers in the home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex. It is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood. Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years.

Cox, 627 So.2d at 1220. "It could be that the assumptions underlying these rationales are erroneous, but the very fact that they are arguable is sufficient, on rational-basis review, to immunize the legislative choice from constitutional challenge." *Heller,* 509 U.S. at 333, 113 S.Ct. at 2649-50 (citation and internal punctuation marks omitted). Although the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models are matters of ongoing debate, they ultimately involve empirical disputes not readily amenable to judicial resolution--as well as policy judgments best exercised in the legislative arena. For our present purposes, it is sufficient that these considerations provide a reasonably conceivable

rationale for Florida to preclude all homosexuals, but not all heterosexual singles, from adopting.

The possibility, raised by appellants, that some homosexual households, including those of appellants, would provide a better environment than would some heterosexual single-parent households does not alter our analysis. The Supreme Court repeatedly has instructed that neither the fact that a classification may be overinclusive or underinclusive nor the fact that a generalization underlying a classification is subject to exceptions renders the classification irrational.[20] "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 321, 113 S.Ct. at 2643. We conclude that there are plausible rational reasons for the disparate treatment of homosexuals and heterosexual singles under Florida adoption law and that, to the extent that the classification may be imperfect, that imperfection does not rise to the level of a constitutional infraction.

b. Current Foster Care Population

Appellants make much of the fact that Florida has over three thousand children who are currently in foster care

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[20] *See, e.g., Beach Communications,* 508 U.S. at 315-16, 113 S.Ct. at 2102 (noting that defining legislative classes "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration") (citation omitted); *Vance,* 440 U.S. at 108, 99 S.Ct. at 948 ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required.") (internal quotation marks omitted); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 8, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797 (1974) ("[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.").

and, consequently, have not been placed with permanent adoptive families. According to appellants, because excluding homosexuals from the pool of prospective adoptive parents will not create more eligible married couples to reduce the backlog, it is impossible for the legislature to believe that the statute advances the state's interest in placing children with married couples.

We do not agree that the statute does not further the state's interest in promoting nuclear-family adoption because it may delay the adoption of some children. Appellants misconstrue Florida's interest, which is not simply to place children in a permanent home as quickly as possible, but, when placing them, to do so in an optimal home, i.e., one in which there is a heterosexual couple or the potential for one. According to appellants' logic, every restriction on adoptive-parent candidates, such as income, in-state residency, and criminal record--none of which creates more available married couples--are likewise constitutionally suspect as long as Florida has a backlog of unadopted foster children. The best interests of children, however, are not automatically served by adoption into *any* available home merely because it is permanent. Moreover, the legislature could rationally act on the theory that not placing adoptees in homosexual households increases the probability that these children eventually will be placed with married-couple families, thus furthering the state's goal of optimal placement. Therefore, we conclude that Florida's current foster care backlog does not render the statute irrational.

c. Foster Care and Legal Guardianship

Noting that Florida law permits homosexuals to become foster parents and permanent guardians, appellants contend that this fact demonstrates that Florida must not truly believe that placement in a homosexual household is

not in a child's best interests.[21] We do not find that the fact that Florida has permitted homosexual foster homes and guardianships defeats the rational relationship between the statute and the state's asserted interest. We have not located and appellants have not cited any precedent indicating that a disparity between a law and its enforcement is a relevant consideration on rational-basis review, which only asks whether the legislature could have reasonably thought that the challenged law would further a legitimate state interest. Thus, to the extent that foster care and guardianship placements with homosexuals are the handiwork of Florida's executive branch, they are irrelevant to the question of the *legislative* rationale for Florida's adoption scheme.[22] To the extent that these placements are the product of an intentional legislative choice to treat foster care and guardianships differently than adoption, the distinction is not an irrational one. Indeed, it bears a rational relationship to Florida's interest in promoting the nuclear-family model of adoption since foster care and guardianship have neither the permanence nor the societal, cultural, and legal significance as does adoptive parenthood, which is the legal equivalent of natural parenthood. Fla. Stat. § 63.032(2).

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[21] Aside from their own situations, appellants have offered no competent evidence as to the extent of homosexual foster homes and guardianships in Florida. Florida asserts, and appellants do not dispute, that in discovery it was able to locate only one known homosexual foster parent, aside from present parties, in all of Dade and Monroe Counties.

[22] For similar reasons, we find inapposite appellants' proffer of the deposition testimony of DCF personnel acknowledging that they were personally unaware of any harms to children caused by having homosexual parents. Even if these statements of personal opinion can be charged to DCF (whose official position throughout this litigation has been to the contrary), they are irrelevant to the question of whether the Florida *legislature* could have had a rational basis for enacting the statute.

Foster care and legal guardianship are designed to address a different situation than permanent adoption, and "the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Communications,* 508 U.S. at 316, 113 S.Ct. at 2102. The fact that "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others," does not render the legislative solution invalid. *Id.* (citation omitted); *Heller,* 509 U.S. at 321, 113 S.Ct. at 2643 ("The problems of government are practical ones and may justify, if they do not require, rough accommodations-- illogical, it may be, and unscientific.") (citation omitted). We conclude that the rationality of the statute is not defeated by the fact that Florida permits homosexual persons to serve as foster parents and legal guardians.

d. Social Science Research

Appellants cite recent social science research and the opinion of mental health professionals and child welfare organizations as evidence that there is no child welfare basis for excluding homosexuals from adopting.[23] They argue that the cited studies show that the parenting skills of homosexual parents are at least equivalent to those of heterosexual parents and that children raised by homosexual parents suffer no adverse outcomes. Appellants also point to the policies and practices of numerous adoption agencies that permit homosexual persons to adopt.

In considering appellants' argument, we must ask not whether the latest in social science research and professional opinion *support* the decision of the Florida legislature, but whether that evidence is so well established and so far

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[23] For the sake of simplicity, our discussion here will attribute to appellants not only their own arguments but also the arguments made in the *amicus* brief filed jointly on their behalf by the Child Welfare League of America, Children's Rights, Inc., the Evan B. Donaldson Adoption Institute, and the National Center for Youth Law.

beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its children are best served by not permitting homosexual adoption. Also, we must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to this recent social science research. We must assume, for example, that the legislature might be aware of the critiques of the studies cited by appellants--critiques that have highlighted significant flaws in the studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.[24]

Alternatively, the legislature might consider and credit other studies that have found that children raised in homosexual households fare differently on a number of measures, doing worse on some of them, than children raised in similarly situated heterosexual households.[25] Or the

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[24] *See, e.g.,* D. Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications,* 31 Developmental Psychol. 130 (No. 1, 1995) (reviewing various studies and questioning them on "theoretical and empirical grounds" because of flaws such as small sample sizes, reliance on self-report instruments, and self-selected, unrepresentative study populations); R. Lerner & A.K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting,* Marriage Law Project (Jan.2001) (reviewing forty-nine studies on same-sex parenting and finding recurring methodological flaws, including failure to use testable hypotheses, lack of control methods, unrepresentative study populations, self-selected sample groups, and use of negative hypotheses); J. Stacey & T. Biblarz, *(How) Does the Sexual Orientation of Parents Matter,* 66 Am. Soc. Rev. 159, 166 (2001) (reviewing 21 studies and finding various methodological flaws, leading authors to conclude that "there are no studies of child development based on random, representative samples" of same-sex households).

[25] *See, e.g.,* K. Cameron & P. Cameron, *Homosexual Parents,* 31 Adolescence 757, 770-774 (1996) (reporting study findings that children raised by homosexual parents suffer from disproportionately high

legislature might consider, and even credit, the research cited by appellants, but find it premature to rely on a very recent and still developing body of research, particularly in light of the absence of longitudinal studies following child subjects into adulthood and of studies of adopted, rather than natural, children of homosexual parents.[26]

We do not find any of these possible legislative responses to be irrational. Openly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults. Scientific attempts to study homosexual parenting in general are still in their nascent stages and so far have yielded inconclusive and

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incidence of emotional disturbance and sexual victimization); Stacey & Biblarz, *supra*, at 170 (concluding, based on study results, that "parental sexual orientation is positively associated with the possibility that children will attain a similar orientation, and theory and common sense also support such a view").

[26] We also note Justice Cordy's extensive, and persuasive, discussion of the currently available body of research on the question of homosexual parenting in his dissenting opinion in *Goodridge v. Dep't of Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After surveying the early findings, as well as the critiques, of that research (much of which was also proffered by the parties and *amici curiae* in this case), Justice Cordy concludes:

> Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm. *Id.* at 999-1000 (Cordy, J., dissenting) (footnote omitted).

conflicting results. Thus, it is hardly surprising that the question of the effects of homosexual parenting on childhood development is one on which even experts of good faith reasonably disagree. Given this state of affairs, it is not irrational for the Florida legislature to credit one side of the debate over the other. Nor is it irrational for the legislature to proceed with deliberate caution before placing adoptive children in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries. Accordingly, we conclude that appellants' proffered social science evidence does not disprove the rational basis of the Florida statute.

e. *Romer v. Evans*

Finally, we disagree with appellants' contention that *Romer* requires us to strike down the Florida statute. In *Romer*, the Supreme Court invalidated Amendment 2 to the Colorado state constitution, which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. 517 U.S. 620, 624, 116 S.Ct. 1620, 1623, 134 L.Ed.2d 855 (1996). The constitutional defect in Amendment 2 was the disjunction between the "[s]weeping and comprehensive" classification it imposed on homosexuals and the state's asserted bases for the classification-- respect for freedom of association and conservation of resources to fight race and gender discrimination. *Id.* at 627, 116 S.Ct. at 1625. The Court concluded that the Amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." *Id.* at 632, 116 S.Ct. at 1627.

Unlike Colorado's Amendment 2, Florida's statute is not so "[s]weeping and comprehensive" as to render Florida's rationales for the statute "inexplicable by anything but animus" toward its homosexual residents. Amendment 2

deprived homosexual persons of "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631, 116 S.Ct. at 1627. In contrast to this "broad and undifferentiated disability," the Florida classification is limited to the narrow and discrete context of access to the statutory privilege of adoption[27] and, more importantly, has a plausible connection with the state's asserted interest. *Id.* at 632, 116 S.Ct. at 1627. Moreover, not only is the effect of Florida's classification dramatically smaller, but the classification itself is narrower. Whereas Amendment 2's classification encompassed both conduct *and* status, *id.* at 624, 116 S.Ct. at 1623 (quoting the text of Amendment 2, which covered "homosexual, lesbian or bisexual orientation, conduct, practices or relationships"), Florida's adoption prohibition is limited to conduct, *see Cox,* 627 So.2d at 1215. Thus, we conclude that *Romer* 's unique factual situation and narrow holding are inapposite to this case.

III. CONCLUSION

We exercise great caution when asked to take sides in an ongoing public policy debate, such as the current one over the compatibility of homosexual conduct with the duties of adoptive parenthood. *See Reno,* 507 U.S. at 315, 113 S.Ct. at 1454; *Schall v. Martin,* 467 U.S. 253, 281, 104 S.Ct. 2403,

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[27] *See also Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289, 299 (6th Cir.1997):

> [T]he *Romer* majority's rejection of rational relationship assessment hinged upon the wide breadth of Colorado Amendment 2, which deprived a politically unpopular minority of the opportunity to secure special rights at every level of state law. The uniqueness of Colorado Amendment 2's sweeping scope and effect differentiated it from the "ordinary case" in which a law adversely affects a discernable group in a relatively discrete manner and limited degree.

2419, 81 L.Ed.2d 207 (1984). The State of Florida has made the determination that it is not in the best interests of its displaced children to be adopted by individuals who "engage in current, voluntary homosexual activity," *Cox,* 627 So.2d at 1215, and we have found nothing in the Constitution that forbids this policy judgment. Thus, any argument that the Florida legislature was misguided in its decision is one of legislative policy, not constitutional law. The legislature is the proper forum for this debate, and we do not sit as a superlegislature "to award by judicial decree what was not achievable by political consensus." *Thomasson v. Perry,* 80 F.3d 915, 923 (4th Cir.1996). The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16723

D.C. Docket No. 99-10058-CV-JLK

STEVEN LOFTON, DOUGLAS HOUGHTON, TIMOTHY ACARO, next friend of John Doe and John Roe, WAYNE SMITH, DANIEL SKAHEN, JOHN DOE, JOHN ROE, minor children,

Plaintiffs-Appellants,

ANGELA GILMORE, et al.,

Plaintiffs,

versus

SECRETARY OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES, (formerly H.R.S.), DISTRICT ADMINISTRATOR, District XI of Florida Department of Children and Family Services,

Defendants-Appellees,

CHARLIE CRIST, Attorney General of the State of Florida,

Defendant,

ROBERT PAPPAS, District Administrator, District X of Florida Department of Children and Family Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 21, 2004)

ON PETITION FOR REHEARING EN BANC
(Opinion Jan. 28, 2004, 11th Cir., 358 F.3d 804)

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges.

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedures; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

BIRCH, Circuit Judge, Specially Concurring in the Denial of Rehearing En Banc:

The dissents to the denial of rehearing *en banc* both agree that the Equal Protection Clause challenge to the Florida statute at issue should have been embraced by our court. After a review of the Supreme Court's decisions in *Eisenstadt*,[1] *Moreno*,[2] *Cleburne*,[3] and *Romer*,[4] the vociferous dissent by my sister jurist (for whom I have great respect and affection), liberally quoting from Justice O'Connor's *concurring* opinion in *Lawrence*,[5] concludes that under a rational basis analysis or, alternatively, an animus-motivated

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[1] *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972).

[2] *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821 (1973).

[3] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249 (1985).

[4] *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996).

[5] *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003).

analysis, the Florida adoption statute at issue is constitutionally flawed. In addition to the discussion by the unanimous panel in *Lofton,* 358 F.3d 804, 817-827, that reaches a contrary conclusion, I would offer the following additional considerations to balance those suggested by Judge Barkett's spirited and well-crafted dissent.

The *Lofton* panel's analysis and approach in this case was premised on a fundamental principal or philosophy, articulated well by Justice Felix Frankfurter in his concurring opinion in *Dennis v. United States,* 341 U.S. 494, 525, 71 S.Ct. 857, 875 (1951), when he observed:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

The dissent, instead of approaching the issue as the panel did in this case by asking "[W]hether the Florida legislature *could* have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions," *Lofton,* 358 F.3d at 820, seeks to disparage a fundamental rationale of the Florida *legislature.* Both the Florida attorney general and a Florida appellate court, specifically considering an equal protection challenge to the statute, articulated a rational and arguable basis for the statute: "[W]hatever causes a person to become a homosexual, it is clear that the state cannot know the sexual preferences that a child will exhibit as an adult. Statistically, the state does

know that a very high percentage of children available for adoption will develop heterosexual preferences." *Fla. Dep't of Health & Rehab. Servs. v. Cox,* 627 So.2d 1210, 1229 (Fla.Dist.Ct.App.1993). Stated differently, the mainstream of contemporary American family life consists of heterosexual individuals. Can it be seriously contended that an arguably rational basis does not exist for placing adoptive children in the *mainstream* of American family life? And that to do so is irrational? I think not. In fact, the Congress of the United States in determining what is in the best interests of other special needs children, the handicapped, has passed laws focused on educationally *mainstreaming* such children. *See, e.g.,* 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled").

It is also worthy to note that the dissent would focus on conduct by Florida's *executive branch* (the Department of Children and Family Services ["the Department"]) and Florida's *judicial branch* (citing just two isolated custody determinations), which the dissent argues is inconsistent with the *legislature's* arguably rational bases. Recall that the Supreme Court has held: "It could be that the assumptions underlying these rationales are erroneous, but the very fact that they are *arguable* is sufficient, on rational-basis review, to immunize the legislative choice from constitutional challenge." *Heller v. Doe,* 509 U.S. 312, 333, 113 S.Ct. 2637, 2649-50 (1993) (citation and internal punctuation marks omitted) (emphasis mine). Moreover, post-legislation conduct, including the passage of regulations, by the executive agency that must find placements for parentless children, which may be at times inconsistent with the spirit, if not the letter, of a legislative enactment, should not weigh heavily in the calculus of rational basis review. The executive branch, acting through unelected bureaucrats who,

while undoubtedly concerned about the best interests of their wards, often are motivated by other concerns such as coping with inadequate resources and an unmanageable number of unplaced children. As the *Lofton* panel recognized:

> The Equal Protection Clause of the Fourteenth Amendment proclaims that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV, § 1. The central mandate of the equal protection guarantee is that "[t]he sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson,* 463 U.S. 248, 265, 103 S.Ct. 2985, 2995, 77 L.Ed.2d 614 (1983). Equal protection, however, does not forbid legislative classifications. *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). "It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* Unless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest. *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996). As we have explained, Florida's statute burdens no fundamental rights. Moreover, all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.[16] Because the present case involves

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[16] *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289 (6th Cir.1997); *Holmes v. Cal. Army Nat'l Guard,* 124 F.3d 1126 (9th Cir.1997); *Richenberg v. Perry,* 97 F.3d 256 (8th Cir.1996);

neither a fundamental right nor a suspect class, we review the Florida statute under the rational-basis standard.

Rational-basis review, "a paradigm of judicial restraint," does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-14, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) (citation omitted). The question is simply whether the challenged legislation is rationally related to a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). Under this deferential standard, a legislative classification "is accorded a strong presumption of validity," *id.* at 319, 113 S.Ct. at 2642, and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *id.* at 320, 113 S.Ct. at 2642 (citation omitted). This holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 517 U.S. at 632, 116 S.Ct. at 1627. Moreover, a state has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320, 113

Thomasson v. Perry, 80 F.3d 915 (4th Cir.1996); *Steffan v. Perry*, 41 F.3d 677 (D.C.Cir.1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989); *Woodward v. United States*, 871 F.2d 1068 (Fed.Cir.1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir.1984); *Rich v. Sec'y of the Army*, 735 F.2d 1220 (10th Cir.1984).

> S.Ct. at 2643. Rather, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 320-21, 113 S.Ct. at 2643 (citation omitted).

Lofton, 358 F.3d. at 817-18. Citing some inconsistent actions by Florida bureaucrats in the Department and two isolated Florida judicial decisions hardly meets the burden "to negative every conceivable basis which might support [the legislative arrangement], whether or not the basis has a foundation in the record." *Heller,* 509 U.S. at 320-21, 113 S.Ct. at 2643.

The dissent also sets up a "straw man" when it suggests: "[t]he panel also intimates in dicta that Florida has a legitimate interest in defending public morality by expressing disapproval of homosexuality." Dissent (Barkett, J.) at 1300. The footnote was not motivated by some sort of homophobic agenda, but only acknowledged the argument advanced by Florida's counsel that public morality was a rational basis and thus the panel stated, given our finding of a mainstreaming rationale as a rational basis, that "it is unnecessary for us to resolve the question [of a public morality basis]." *Lofton,* 358 F.3d at 819.

Turning now from the dissent's attack on the rational basis predicate to its alternative "animus/analysis" challenge, I offer the following perspectives in counter-balance to the arguments by the dissent. The dissent advances a second equal protection argument in favor of striking down the Florida adoption statute's categorical prohibition against practicing homosexual citizens. As I understand the dissent's argument, once it is demonstrated that the motivation propelling a piece of legislation is animus, a different sort of analysis from a traditional "any-existing-rational-basis-will-justify" approach must be employed, as putatively mandated

by Supreme Court precedents in *Romer, Cleburne, Moreno* and *Eisenstadt.* Under this "animus/analysis," a court is required to examine whether the proffered reasons for the statute are pretextual--particularly in light of what the State (including its executive branch [here the Department] and judicial branch [courts awarding custody to homosexual parents, etc.]) does that is contradictory to the statute.

While a principled argument can be made on this equal protection animus/analysis that might result in invalidation of this statute, *see Shahar v. Bowers,* 114 F.3d 1097, 1125 (1997) (en banc) (Birch, J., dissenting), the *Lofton* panel was not willing to embrace that more adventurous leap and preferred to stay with a more traditional analytical approach that ignored the actual legislative history and instead searched for any rational basis.

The real point of disagreement between the *Lofton* panel and the dissent is whether rational-basis review should always uphold a law as long as there exists some "conceivable" rational basis--or whether there are certain instances that call for a "more searching" form of rational-basis review that examines the actual motivations underlying the law. Accordingly, I offer the counter-argument to the dissent's "heightened rational-basis review" theory.

The dissent's interpretation of *Romer, Cleburne, Moreno* and *Eisenstadt*--and its theory that these precedents call for a "more searching" form of rational-basis review--is summarized well in the following passage:

> In all four cases, the Court concluded that the asserted justifications were not rationally related to the classification. Thus, the Court inferred that animus was the motivation behind the legislation and established that such a motivation could not constitute a legitimate state interest.

Dissent (Barkett, J.) at ___.

Aside from Justice O'Connor's *Lawrence* concurrence, I have found in the Supreme Court's language no explicit support for the theory that rational-basis review should examine the actual motivation behind legislation (assuming that such a thing can be divined with any accuracy). I also note the Supreme Court's own observation that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Communications. Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211 (1993); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929 (1986) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.") (citation omitted).

Moreover, my review of the cases cited by the dissent fails to convince me that those opinions applied a "heightened" form of review as the dissent contends. In that vein, I offer my more conventional and measured reading of each of those precedents.

The *Romer* Court found Colorado's Amendment 2--a "sweeping and comprehensive" measure that imposed a "broad and undifferentiated disability" on the state's homosexual residents--to be "inexplicable by anything but animus" because the breadth of the Amendment so exceeded its proffered rationales. 517 U.S. 620, 116 S.Ct. 1620 (1996). As I understand it, the fatal defect in Amendment 2 was not that the Court determined that *actual* animus motivated passage of the Amendment. Indeed, in contrast to the dissent's scrutiny of the legislative history of the Florida statute, the *Romer* Court never examined the actual history of the plebiscite vote that led to passage of Amendment 2,

nor the accompanying campaign rhetoric or the "intent" of the electorate.

Instead, the Court found the proffered rationales so implausible that the Court *inferred* that animus was the only conceivable (as opposed to actual) rationale. *See id.* at 632, 116 S.Ct. at 1627 (The Amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."). In its pivotal language, the Court stated:

> The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id. at 635, 116 S.Ct. at 1629.

In sum, I read *Romer* to stand for the proposition that when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. And animus *alone* cannot constitute a legitimate government interest.

In *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249 (1985), the Supreme Court invalidated, under the rational-basis test, a municipal zoning ordinance requiring a group home for the mentally retarded to obtain a special use permit. *Id.* at 435, 105 S.Ct. at 3252. Although the municipality offered various justifications for the ordinance, the Court could not discern how these justifications applied particularly to mentally retarded residents--but not to other groups of persons who could freely occupy the identical structure without a permit, such as boarding houses, fraternity houses, and nursing homes. *Id.* at 449-50, 105 S.Ct. at 3259-60.

Cleburne stands primarily for the proposition that irrational prejudice is not a legitimate state interest. And irrational prejudice can be inferred as the basis for a classification when there is no reason to believe that the disadvantaged class is different, in relevant respects, from similarly situated classes.

I would also note this recent gloss that the Court gave *Cleburne* in *Bd. of Trustees of the Univ. of Alabama v. Garrett*:

> The Court's reasoning was that the city's purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects. Although the group home for the mentally retarded was required to obtain a special use permit, apartment houses, other multiple-family dwellings, retirement homes, nursing homes, sanitariums, hospitals, boarding houses, fraternity and sorority houses, and dormitories were not subject to the ordinance.

531 U.S. 356, 366 n. 4, 121 S.Ct. 955, 963 n. 4 (2001). *Garrett* also expressly rejected the theory that, under

Cleburne, the mere presence of animus can fatally taint a statute against a rational-basis challenge:

> Justice Breyer suggests that *Cleburne* stands for the broad proposition that state decision making reflecting "negative attitudes" or "fear" necessarily runs afoul of the Fourteenth Amendment. Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make. As we noted in *Cleburne:* "[M]ere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently...."

Id. at 367, 121 S.Ct. at 964 (internal citations omitted) (emphasis added in *Garrett)*[6]. In *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821 (1973), the Court found that Section 3(a) the Federal Food Stamp Act, which forbade assistance to any "household" wherein one member was unrelated to any other member, was not rationally related to any legitimate state interest, including the proffered reasons, such as fraud prevention. This led to the Court to conclude that the only plausible rationale for the provision was to prevent hippie communes from taking advantage of food stamp assistance. And this, by itself, was not a sufficient basis to sustain the provision: "a bare

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[6] With regard to the argument that actual motivation is relevant on rational basis review, *Garrett* observes that "the State need not articulate its reasoning *at the moment a particular decision is made.* Rather, the burden is upon the challenging party to negative *any reasonably conceivable* state of facts that could provide a rational basis for the classification." *Id.* at 367, 121 S.Ct. at 964 (internal quotation marks omitted) (emphasis mine).

congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest ... *without reference to some independent considerations in the public interest.*" *Id.* at 534, 93 S.Ct. at 2826 (emphasis mine).

I call particular attention to a later gloss on *Moreno* expressly disclaiming the theory that *Moreno* stands for something more than traditional rational-basis review:

> [In *Moreno,*] we upheld an equal protection challenge to a provision of the Food Stamp Act and concluded that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." This statement is *merely an application of the usual rational-basis test:* if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an illegitimate governmental interest. Accordingly, in *Moreno* itself we examined the challenged provision under the rational-basis standard of review.

Lyng v. United Auto. Workers of America, 485 U.S. 360, 370 n. 8, 108 S.Ct. 1184, 1192 n. 8 (1988) (emphasis mine).

In *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972), the issue was whether a Massachusetts law that prevented dispensation of contraceptives to unmarried persons unless the purpose was to prevent disease violated the Equal Protection clause by treating married and unmarried persons differently. In *Eisenstadt,* as in *Romer,* the fatal defect was not a determination that actual animus motivated the law, but that the proffered rationales were implausible. *See id.* at 449, 92 S.Ct. at 1036 ("Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled

with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim."). As I understand it, the *Eisenstadt* Court was not, as the dissent suggests, looking at the actual motivations behind the statute. Instead, the Court simply found that the proffered reasons did not rationally relate to the scope of the legislation and, accordingly, the classification failed rational-basis review.

The *Lofton* panel concluded its analysis with the following observation: "Florida has made the determination that it is not in the best interests of its displaced children to be adopted by [homosexuals] ... and we have found nothing in the Constitution that forbids this policy judgment. Thus, any argument that the Florida legislature was misguided in its decision is one of legislative policy, not constitutional law. The legislature is the proper forum for this debate, and we do not sit as a super legislature 'to award by judicial decree what was not achievable by political consensus.' " *Lofton,* 358 F.3d at 827 (citation omitted). The dissent would have this court impose its putatively superior judgment on this policy issue and legislate from the bench. Such a breach of the separation of powers and departure from deference to the elected lawmakers of Florida, we have rejected. Only where the laws of Florida can be demonstrated to be irrational on any arguable basis or constitute a clear deprivation of a citizen's fundamental rights should this court substitute its judgment for that of the Florida legislature. Thus, I turn to the alternative analysis by one of the dissents that finds such a fundamental right having been articulated in the Supreme Court's decision in *Lawrence.*

The right to privacy that is the touchstone for a right to sexual intimacy by consenting adults (hereinafter "RSI/CA") has its Supreme Court lineage and trajectory through the decisions in *Griswold* (1965),[7] *Eisenstadt*

[7] *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678 (1965).

(1972),[8] *Roe v. Wade* (1973),[9] and *Carey* (1977),[10] and culminating with *Lawrence* (2003) (which leveled the only speed-bump in that trajectory, *Bowers v. Hardwick* (1986).[11] There seems to be only one problem with this theory, albeit in the form of a footnote:

> [T]he Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults, and we do not purport to answer that question now.

Carey, 431 U.S. at 688 n. 5, 97 S.Ct. at 2018 n. 5 (internal punctuation and citation omitted). I suggest that the answer to *Carey's* "difficult question" was not provided to us in *Lawrence* when viewed through an objective lens. I find that the most coherent lens through which to read *Lawrence* and its often enigmatic language is to recall that most of that language is devoted to explaining why the Court was not bound by its prior decision in *Bowers.* Perhaps the best way to explain this reading is to begin with the dissent's chief critique of the *Lofton* panel's interpretation of *Lawrence.* The dissent posits that the *Lofton* panel failed to recognize that *Lawrence* unequivocally held that consenting adults have a *substantive* due process right to engage in private intimate sexual conduct. This statement highlights well where the dissent and the *Lofton* panel part company. The first task in faithfully applying precedent, including that of the Supreme Court, is to look to the actual holding of the relevant precedent. That task requires examining the facts that were

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[8] *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972).

[9] 410 U.S. 113, 93 S.Ct. 705 (1973).

[10] *Carey v. Population Srvs. Int'l,* 431 U.S. 678, 97 S.Ct. 2010 (1977).

[11] 478 U.S. 186, 106 S.Ct. 2841 (1986).

before the deciding court and ascertaining what conclusions of law were *necessarily* reached in disposing of the case.

A word-count approach as apparently employed by the dissent, in addition to being too formalistic, is problematic in practice. For example, my own unscientific survey of the words, phrases, sentences, and paragraphs used in *Lawrence* reveals not only language from which can be inferred a RSI/CA, but even stronger language from which we might infer any number of new rights, or even a new mandate in conducting constitutional review. *See, e.g.*, 123 S.Ct. at 2475 ("The instant case involves liberty of the person both in its spatial and more transcendent dimensions."); *id.* at 2481 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.") (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 2807 (1992)); *id.* at 2483 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

I realize these are outer examples, but they point to the importance of attentiveness to context in interpreting precedent--and in distinguishing binding language from advisory *dicta*. It was this distinction that the *Lofton* panel carefully made in construing *Lawrence* and its holding: "*Lawrence* 's holding was that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct." *Lofton*, 358 F.3d at 815. I would add that this holding relied on two predicate legal conclusions: (1) that *stare decisis* did not require that *Bowers* 's precedent be followed and (2) that Texas's sodomy prohibition did not further a legitimate state interest. It was

necessary for the Court to reach the first conclusion because *Bowers* had upheld Georgia's sodomy statute against, *inter alia*, a rational-basis challenge. And the second conclusion was all that was required to resolve the dispositive question of whether the Texas sodomy law was constitutional.

To read *Lawrence* 's holding any broader would be to assume that the Court departed from the established principle of minimalism in deciding constitutional matters. Of course, the Court will so depart from time to time, usually when announcing a new rule of constitutional law that will require frequent application by the lower courts (precedents like *Miranda v. Arizona,*[12] *Strickland v. Washington,*[13] and *BMW v. Gore*[14] come to mind). And those decisions are typically accompanied with clear guideposts for applying the new rule. *Lawrence* does not appear to be such a case. We find in the opinion no such guideposts; there is no description of the scope of this putative fundamental right, no standard of review for scrutinizing infringements on that right, no balancing test, and so on.

What we do find in the *Lawrence* opinion by way of mandate is that *Bowers* is no longer to be treated as good law. Indeed, *Bowers* is its constant point of reference, and the unrelenting thrust of *Lawrence's* analysis is to show that *Bowers* should not have reached the result it did. This begins in the first paragraph of the majority opinion's analysis, where the Court announced, "[W]e deem it necessary to reconsider the Court's holding in *Bowers.*" 123 S.Ct. at 2476. Virtually the entire remainder of the opinion is focused upon explaining *Bowers* 's shortcomings, culminating in the pronouncement that "*Bowers* was not correct when it was

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[12] 384 U.S. 436, 86 S.Ct. 1602 (1966).

[13] 466 U.S. 668, 104 S.Ct. 2052 (1984)

[14] *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589 (1996)

decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id.* at 2484. Having cleared *Bowers* from the books, the Court's analysis spends a mere two paragraphs on the facts of the *Lawrence* case--and disposes of the case in a single sentence: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

An important point bears noting here. To say that *Lawrence* overruled *Bowers* is not to say that every question *Bowers* answered in the negative should now be answered in the affirmative (or vice versa).[15] For example, although the *Lawrence* Court specifically noted that *Bowers* misframed the issue as one of whether there is a right to engage in sodomy, the Court never identified how *Bowers* should in fact have framed the inquiry-- much less what the precise answer to that inquiry should have been. *Id.* at 2478. We see this pattern throughout the *Lawrence* opinion. The opinion contains extensive critique of *Bowers* 's answers to the questions raised in that case--but virtually no definitive answers to those questions, much less rules of law. Another example is *Lawrence* 's history discussion. After noting *Bowers* 's misframing of its inquiry, the Court went on to point out some of the "fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers.*" *Id.* ("Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: 'Proscriptions against that conduct have ancient roots.'

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[15] For an even narrower interpretation of the extent to which *Bowers* was overruled, *see* Justice Scalia's dissent. Because the resolution of the instant case only required reaching the rational basis of the challenged statute, it was Justice Scalia's suggestion that *Lawrence* only overruled the rational-basis aspect of *Bowers* 's holding, but left intact its fundamental-rights holding. 123 S.Ct. at 2488 (Scalia, J., concurring).

"). Here, again, the Court only pointed to shortcomings in *Bowers* 's analysis, but did not reach any conclusions itself, noting that "[w]e need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance." *Id.; see also id.* at 2480 ("In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.").

In short, the critique of *Bowers* provides the necessary context for understanding the great bulk of *Lawrence* 's language--including much of the language that the dissent quotes in support of its RSI/CA argument. For example, the dissent's main premise--that *Lawrence* "held that consenting adults have a right under the Due Process Clause to engage in private sexual conduct, including homosexual conduct," Dissent (Barkett, J.) at 1303, relies heavily on the Court's analysis of the privacy cases preceding *Bowers,* namely, *Griswold, Eisenstadt, Roe,* and *Carey.*

Far from engaging in an extensive analysis, the Court spent less than a page surveying these precedents. 123 S.Ct. at 2476-77. More importantly, rather than put any definitive gloss on these precedents, the Court canvassed them in order to point out that "[t]his was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick.*" *Id.* at 2477.

And so I return to my opening suggestion that the most coherent and objective lens through which to read *Lawrence* is to recall that the purpose of the vast bulk of its analysis was to call into question and ultimately overrule *Bowers.* Of course, this still leaves open the thorny question of to what extent the *Griswold* line of cases--which no longer must be reconciled with *Bowers*--establish a RSI/CA, as well

as what standard of review that right would trigger. The question is further complicated by *Carey* 's footnote 5, which not only disavowed that those precedents had definitely established such a right, but also rejected the argument that strict scrutiny was the appropriate standard. *See* 431 U.S. at 688 n. 5, 97 S.Ct. at 2018 n. 5.

The dissent would have our court create a new fundamental substantive due process right where none has existed before. The *Lofton* panel and this court's rejection of *en banc* review has declined such an activist approach and has sought to "exercise the utmost care whenever ... asked to break new ground" in the field of fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 2268 (1997). I submit that the latter is the best advised course--particularly in this area where the Court appears to be breaking new ground, but has crafted its opinions to avoid fashioning bright-line rules and to limit its holdings to the facts of the immediate case.[16] In my view, the most judicious way to follow such precedents is to apply their holdings to cases involving the same facts and permit the Supreme Court itself to clarify the gray areas it has apparently (and perhaps intentionally) left for another day. It may well be that the Court in time takes its jurisprudence in the direction that the dissent advocates. But that, in my opinion, is a step for the Supreme Court to take.

The *Lofton* panel chose not to expand *Lawrence* through inference and extrapolation, but rather applied the holding of *Lawrence* to the facts at hand. Our reading finds

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[16] *Cf. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 1998 WL 101701 (6th Cir. Feb. 5, 1998) (Boggs, J., concurring in denial of rehearing en banc) ("Even the staunchest proponents of the Supreme Court's decision in *Romer v. Evans* readily admit that the Court in that case purposely crafted a narrow opinion focused on the precise factual situation presented by Colorado's Amendment 2.") (citation omitted).

its legitimacy in the following passage from *Lawrence*, a passage in which the Court clearly limited the scope of its holding:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra,* at 847, 505 U.S. 833, 112 S.Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

123 S.Ct. at 2484.

As the *Lofton* panel explains, this case is different from *Lawrence* because this is not a criminal prosecution, because the state is not attempting to intervene in the private lives of any adults, because adoption is not a private act but a public one, and because, when it permits people to adopt, the

state confers official status on them as adoptive parents. 358 F.3d at 817 ("the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition"). This case is different from *Lawrence,* the *Lofton* panel opinion points out, because Florida's statute does further a legitimate state interest. It furthers the legitimate interest the state has in encouraging what it deems to be the optimal family structure, a home that has both a mother and a father, *id.* at 819-20, or at least one parent in the heterosexual mainstream of American family life. The plaintiffs did not seriously contest the legal sufficiency of that state interest, but instead argued that the Florida law is not rationally related to that interest, an argument that the panel opinion thoroughly addresses. *Id.* at 820-26.

The dissent places great emphasis on the fact that the Court announced at the beginning of its opinion that "the case should be resolved by determining whether the petitioners were free as adults to engage in [their] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Lawrence,* 123 S.Ct. at 2476. According to it, this language, along with the Court's other references to due process "liberty," requires that we interpret *Lawrence* as affirming a fundamental or substantive due process right to private consensual adult intimacy. It contends that this, in turn, requires that we subject the challenged Florida statute to "heightened scrutiny."[17]

Then the dissent makes two related assumptions. First, it conflates substantive due process analysis and fundamental rights analysis--or at least treats the two as

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[17] The dissent repeatedly refers to this "heightened scrutiny," but never expressly specifies what standard of review it would entail. However, it appears to be strict scrutiny. *See* Dissent (Barkett, J.) at 1312 ("a compelling and narrowly tailored justification").

interchangeable. Second, it assumes that *Lawrence* 's references to "liberty under the Due Process Clause" are tantamount to acknowledgment of a constitutional right deserving strict scrutiny protection. Upon close scrutiny, neither assumption is sound.

Admittedly, there is considerable overlap between substantive due process analysis and fundamental rights analysis. And the Supreme Court has at times used the term "substantive due process" as shorthand for its fundamental rights analysis. But a careful reading of the Court's precedents indicates that its fundamental rights jurisprudence is but one subset of the various doctrines that emanate from the concept of substantive due process.

As our Chief Judge has noted, "In its application, substantive due process is a puzzling concept." *McKinney v. Pate,* 20 F.3d 1550, 1567 (11th Cir.1994) (Edmondson, J., concurring). And even if I had the chutzpah to try, this would hardly be the place to solve that puzzle. I will, however, sketch a few principles that underlie my belief that there is no contradiction between the notion that *Lawrence* employed substantive due process analysis and the *Lofton* panel's conclusion that *Lawrence* 's holding was a rational-basis holding.

As an initial matter, I would suggest that rational-basis review--like every standard of review that scrutinizes the substance of state action for irrationality and arbitrariness--is itself a form of substantive due process review. Although it is rarely classified as such, I find no other plausible constitutional source for its substantive review of state and federal legislative acts. Indeed, "the touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis,* 523 U.S. 833, 845, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998). And it has long been understood that the concept of due process protects against

not only procedural arbitrariness, but also substantive arbitrariness.[18] *See Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) ("And by barring certain government actions regardless of the fairness of the procedures used to implement them, [the due process guarantee] serves to prevent governmental power from being used for purposes of oppression.").

As I understand it, this substantive scrutiny of governmental action is the primary source of the Court's jurisprudence regarding fundamental, or unenumerated, rights (hereinafter, simply "fundamental rights"). However, the concept of substantive due process underlies other doctrines outside the field of fundamental rights. For example, I note that just last term the Court reaffirmed its line of cases holding that there are "substantive constitutional limitations" on the size and severity of civil punitive damage awards. *State Farm Mutual Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416, 123 S.Ct. 1513, 1519 (2003).[19] Another

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[18] In *Lewis,* the Court stated:

> We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see, e.g., Daniels v. Williams,* 474 U.S. at 331 (the *substantive due process guarantee* protects against government power arbitrarily and oppressively exercised). While due process protection in the *substantive* sense limits what the government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.

523 U.S. at 845, 118 S.Ct. at 1716 (internal citations omitted) (emphasis mine).

[19] *See also State Farm Mutual Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416, 123 S.Ct. 1513, 1519-20 (2003) ("The Due Process Clause of the

example is the "shocks the conscience" test, under which courts consider whether the substance of actions by governmental officers is fatally arbitrary.[20]

I note these examples to underscore my point that rational-basis review likewise is a form of substantive review, albeit a deferential one, that protects against the arbitrary and irrational exercise of legislative power in enacting economic and social legislation. *See, e.g., Washington v. Glucksberg,* 521 U.S. 702, 766, 117 S.Ct. 2258, 2282 (1997) (Souter, J., concurring) (canvassing the history of substantive due process and describing rational-basis review as one method, along with fundamental rights

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Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); *id.* at 417, 123 S.Ct. at 1520 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes *substantive* limits on that discretion") (internal quotation marks omitted) (emphasis mine).

[20] *See, e.g., Lewis,* 523 U.S. at 846, 118 S.Ct. at 1716 ("[I]n *Collins v. Harker Heights,* we said again that the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.") (internal citation and quotation marks omitted); *id.* at 850, 118 S.Ct. at 1718-19 ("[O]ur concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."); *Collins v. Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 1070 (1992) (reasoning that city's failure to properly warn its employees about known risks of harm was not "conscience shocking, in a constitutional sense"); *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 2101 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience.' "); *Rochin v. California,* 342 U.S. 165, 169, 72 S.Ct. 205, 208 (1952) ("Due process of law is a summarized constitutional guarantee of respect for those personal immunities which ... are so rooted in the traditions and conscience of our people as to be ranked as fundamental, ... or are implicit in the concept of ordered liberty.") (internal citations and quotation marks omitted).

analysis, and scrutinizing state action for arbitrariness).[21] Accordingly, unlike the dissent, I do not find any incompatibility between (a) the *Lawrence* Court's assertion that "the case should be resolved by determining whether the petitioners were free as adults to engage in [their] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution" and (b) the *Lofton* panel's conclusion that the Court ultimately based its holding on rational-basis grounds.

With regard to the dissent's second implicit assumption, I would submit that the mere fact that a liberty interest receives substantive protection under the Due Process Clause does not automatically trigger strict scrutiny. Based on its interpretation that *Lawrence* recognizes a substantive liberty interest, the dissent contends that any burden to that liberty interest requires strict scrutiny. Its chief exhibits are various lines from *Lawrence* that allude to the petitioners' liberty under the Due Process clause. *See, e.g., Lawrence,* 123 S.Ct. at 2476 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."); *id.* at 2478 ("The liberty

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[21] The Supreme Court's language in *Concrete Pipe & Prods. v. Construction Laborers Pension Trust,* 508 U.S. 602, 113 S.Ct. 2264 (1993), illustrates well this overlap between substantive due process and rational-basis review. The *Concrete Pipe* Court upheld an ERISA provision against, *inter alia,* what the Court described as a "substantive due process" challenge. Although characterizing its analysis as substantive due process analysis, the Court applied classic rational-basis review in upholding the provision. Noting "the deferential standard of review applied in substantive due process challenges to economic legislation," *id.* at 639, 113 S.Ct. at 2288, the Court concluded that the challenged statute was "rationally related to the terms of Concrete Pipe's participation in the Plan it joined and that suffices for *substantive due process* scrutiny of this economic legislation," *id.* at 641, 113 S.Ct. at 2289 (emphasis mine).

protected by the Constitution allows homosexual persons the right to make this choice."); *id.* at 2484 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

The dissent translates these general references to "liberty" under the Due Process Clause into a specific due process right to engage in private sexual conduct. The dissent appears to be: (multiple references to Due Process liberty) + (decision finding Texas sodomy statute unconstitutional) = (holding that there is a substantive due process right to sexual intimacy). But even if I were persuaded that *Lawrence* announced, or "reaffirmed," a substantive due process right to sexual intimacy, I still am not convinced that burdens on this right necessarily would require strict scrutiny. First, as the *Lofton* panel observed, the *Lawrence* Court itself never applied, nor used any of the language of, strict scrutiny. *Lofton,* 358 F.3d at 817. Second, with all due respect, as cryptic as some of the Supreme Court's substantive due process precedents are, my recent review of them convinces me of this much: the mere presence of a substantive liberty interest does not automatically trigger strict scrutiny, as the dissent seems to suggest.

Indeed, even cursory research has revealed several instances in which the Court identified a substantive right under the Fourteenth Amendment--and yet did not require strict scrutiny. I note briefly two examples. The most recent is *Sell v. United States,* 539 U.S. 166, 123 S.Ct. 2174 (2003), issued only days before the *Lawrence* opinion. The *Sell* Court vacated the conviction of a murder defendant who had been administered antipsychotic medication against his wishes in order to render him competent to stand trial. What I find significant is that the Court identified a "*constitutionally protected liberty interest* in avoiding the unwanted administration of antipsychotic drugs," *id.* at 178,

123 S.Ct. at 2183 (internal quotation marks omitted) (emphasis mine), and then proceeded to articulate a standard of review lower than strict scrutiny--"necessary significantly to further important governmental trial-related interests," *id.* at 179, 123 S.Ct. at 2185.

The second case I note is *City of Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849 (1999). There, the plurality opinion recognized, in language similar to that employed in *Lawrence,* that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 53, 119 S.Ct. at 1857. *See also id.* at 54, 119 S.Ct. at 1858 ("[A]n individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage.' "). I call attention to the fact that, despite using this substantive due process language, the *Morales* plurality never hinted at the applicability of strict scrutiny (and instead struck down Chicago's gang loitering statute on vagueness grounds--a decision that nevertheless was predicated on the existence of this "constitutionally protected liberty" to loiter innocently, *id.* at 55, 119 S.Ct. at 1858).[22]

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[22] Also, in a somewhat older case, *Youngberg v. Romeo,* the Court examined "for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment." 457 U.S. 307, 314, 102 S.Ct. 2452, 2457 (1982). The Court concluded that the respondent, an institutionalized mental incompetent, "enjoy[ed] constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Id.* at 324, 102 S.Ct. at 2462. Throughout its opinion, the Court referred to the respondent's substantive liberty interests--yet never treated this liberty as meriting strict scrutiny. *See, e.g., id.* at 315, 102 S.Ct. at 2458 ("the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause"); *id.* ("liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action") (internal

In sum, a closer and careful reading of *Lawrence* and other relevant precedents indicate that, even if *Lawrence* 's *dicta* did acknowledge a constitutional liberty interest in private sexual intimacy, this liberty interest does not rise to the level of a fundamental right nor does it necessarily trigger strict scrutiny.

I will conclude on a purely personal note. If I were a legislator, rather than a judge, I would vote in favor of considering otherwise eligible homosexuals for adoptive parenthood. In reviewing the record in this case one can only be impressed by the courage, tenacity and devotion of Messrs. Lofton and Houghton for the children placed in their care. For these children, these men are the only parents they have ever known. Thus, I consider the policy decision of the Florida legislature to be misguided and trust that over time attitudes will change and it will see the best interest of these children in a different light. Nevertheless, as compelling as this perspective is to me, I will not allow my personal views to conflict with my judicial duty--conduct that apparently fewer and fewer citizens, commentators and Senators seem to understand or appreciate. And, I hasten to add, the vast majority of federal judges, including each and every judge of the Eleventh Circuit, are similarly sensitive to separate their personal preferences from their duty to follow precedent as they understand it.

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punctuation omitted); *id.* at 318, 102 S.Ct. at 2459 ("we have recognized that there is a constitutionally protected liberty interest in safety and freedom from restraint"). Having "established that [the respondent] retain[ed] liberty interests in safety and freedom from bodily restraint," the Court turned to the question of the proper standard for determining whether his "substantive right protected by the Due Process Clause ha[d] been violated." *Id.* at 319, 102 S.Ct. at 2460. The Court ultimately employed a standard of review considerably lower than strict scrutiny (whether the State exercised professional judgment in protecting the rights of its involuntarily committed mentally retarded citizens). *Id.* at 321, 102 S.Ct. at 2461.

ANDERSON, Circuit Judge, Dissenting from the Denial of Rehearing En Banc in which DUBINA, Circuit Judge, joins:

I agree with Judge Barkett that the cases she discusses in Section I of her comprehensive dissent indicate that the challenged provision of the Florida statute violates the Equal Protection Clause. For this reason, and because the issue is of exceptional importance, Fed.R.App.P. 35(a)(2), *en banc* rehearing should be granted.

BARKETT, Circuit Judge, Dissenting from the Denial of Rehearing En Banc:

Lofton v. Sec. of Dep't of Children & Family Services, 358 F.3d 804 (11th Cir.2004), finds constitutional 1977 Fla. Laws, ch. 77-140, § 1, Fla. Stat. § 63.042(3) (2003), which provides that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[1] Florida is the only state in the union to have such a categorical statutory prohibition targeted solely against homosexuals.[2] This provision finds, as a matter of law, hundreds of thousands of Florida citizens unfit to serve as adoptive parents solely because of constitutionally protected conduct. There is no comparable bar in Florida's adoption statute that applies to any other group. Neither child

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[1] For purposes of this statute, the term "homosexual" is "limited to applicants who are known to engage in current, voluntary homosexual activity." *Fla. Dep't of Health & Rehab. Servs. v. Cox,* 627 So.2d 1210, 1215 (Fla.Dist.Ct.App.1993), *aff'd in relevant part,* 656 So.2d 902, 903 (Fla.1995).

[2] Since 2000, Mississippi has statutorily prohibited "adoption by couples of the same gender." Miss.Code Ann. § 93-17-3(2) (2000). In 1999, Arkansas adopted a regulation, not a statute, barring homosexuals from becoming foster parents, not adoptive parents. Ark. Reg. 200.3.2 (1999).

molesters, drug addicts, nor domestic abusers are categorically barred by the statute from serving as adoptive parents. In a very real sense, Florida's adoption statute treats homosexuals less favorably than even those individuals with characteristics that may pose a threat to the well being of children.

While Florida claims that it has singled out homosexuals because it wishes to limit adoptions to married couples, the statute in this case says absolutely nothing about married couples. In fact, Florida's adoption statute expressly provides for single persons to adopt. A full twenty-five percent of adoptions out of foster care in Florida are by single people; in the district covering Miami-Dade County, this figure is over forty percent.[3] This is only the first and most glaring of numerous gaps between the state's ban on homosexual adoption and its purported justification. Under Florida law, for example, single persons who are homosexuals but are "not practicing" may adopt.[4] Florida also permits homosexuals (whether sexually active or not) to serve as foster parents on a *permanent* basis,[5] and the state acknowledges that such foster care placements involve a state of "*de facto* permanency."[6] Finally, Florida permits homosexuals to serve as legal guardians.[7]

The ban on homosexual adoption at issue here violates the Equal Protection Clause of the Fourteenth Amendment because Florida's proffered rational basis is expressly refuted by the state's own law and practice and because a class consisting of all homosexual citizens was

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[3] R. at 124 (Stipulation at ¶¶ 24-25).

[4] *See* note 1 above.

[5] *See* 2000 Fla. Laws, ch.2000-139, § 30, Fla. Stat. § 39.623 (2003).

[6] R. at 24 (Defs.' Mot. to Dismiss at 10).

[7] R. at 124 (Stipulation at ¶¶ 9-11).

targeted solely on the basis of impermissible animus. Thus, as argued in Section I below, even under the lowest standard of review--rational basis--Florida's statute fails to survive equal protection analysis under the Supreme Court's precedents in *Eisenstadt*,[8] *Moreno*,[9] *Cleburne*,[10] and *Romer*.[11]

The state's ban on homosexual adoption also violates the Due Process Clause by conditioning access to the statutory privilege of adoption on surrender of the right to engage in private intimate sexual conduct protected by *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). As argued in Section II below, in upholding the Florida statute, *Lofton* directly conflicts with an entire body of substantive due process jurisprudence, culminating in the Supreme Court's decision in *Lawrence*.

Because of these equal protection and substantive due process precedents, and in light of the "exceptional importance" of the issues raised, this decision clearly warrants *en banc* review. 11th Cir. R. 35-3 (*en banc* consideration is warranted for "precedent-setting error[s] of exceptional importance" or for opinions that are "allegedly in direct conflict with precedent of the Supreme Court or of this circuit").

I. EQUAL PROTECTION

A. The Rational Basis Test Established in the Analogous Cases of *Romer*, *Cleburne*, *Moreno*, and *Eisenstadt* Requires that We Invalidate this Statute.

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[8] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[9] *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

[10] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

[11] *Romer v. Evans*, 517 U.S. 620 (1996).

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne,* 473 U.S. at 439. Yet because of the practical need for legislators to draw distinctions among groups, a classification that neither burdens a fundamental right nor targets a suspect class will be analyzed using rational basis scrutiny, which means that it will be upheld provided that it "bears a rational relation to some legitimate end." *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. Although this is a deferential form of review, a court must still identify legitimate state interests and find a "relationship between the classification adopted and the object to be attained." *Id.* at 632, 116 S.Ct. 1620.

As will be explained more fully below, the classification at issue in this case burdens personal relationships and exudes animus against a politically unpopular group. Under these circumstances, statutes have consistently failed rational basis review. Summarizing these cases, Justice O'Connor observed in her concurrence in *Lawrence* that

> [l]aws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. We have consistently held, however, that some objectives, such as a bare ... desire to harm a politically unpopular group, are not legitimate state interests. *When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.*

Lawrence, 123 S.Ct. at 2484-85 (O'Connor, J., concurring) (internal citations and quotation marks omitted) (emphasis added). Justice O'Connor went on to explain how this principle has been applied by the Court in prior equal protection cases:

> *We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.* In *Department of Agriculture v. Moreno,* for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to discriminate against hippies. The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. In *Eisenstadt v. Baird,* we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne v. Cleburne Living Center,* we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences--like fraternity houses and apartment buildings-- did not have to obtain such a permit. And in *Romer v. Evans,* we disallowed a state statute that impos[ed] a broad and undifferentiated disability on a single named group--specifically, homosexuals. *The dissent apparently agrees that if these cases have* stare decisis *effect, Texas' sodomy law would not pass scrutiny*

> *under the Equal Protection Clause, regardless of the type of rational basis review that we apply.*

Id., 123 S.Ct. at 2484-85 (emphasis added). An examination of these cases bears out Justice O'Connor's point and their direct application here. Regardless of how one labels the rational-basis review employed in these cases, Florida's ban on gay adoption is simply not compatible with them.

All four of these precedents involved legislation targeting politically unpopular groups to varying degrees: "hippies" (*Moreno*), unmarried users of birth control (*Eisenstadt*), the mentally disabled (*Cleburne*), and homosexuals (*Romer*). Moreover, in each case, the Court invalidated a law that had the effect of inhibiting personal relationships of one sort or another: among mentally disabled or unrelated persons who wished to share a common living space (*Cleburne* and *Moreno*); among unmarried individuals who wished to engage in intimate relations (*Eisenstadt*); and among individuals who wished to live without fear of state-sanctioned discrimination prompted solely by their attachment to persons of the same sex (*Romer*).

In *Moreno*, the Supreme Court found that excluding individuals unrelated to other household members from the federal food stamp program was not rationally related to the government's asserted interest in minimizing administrative fraud. 413 U.S. at 535, 93 S.Ct. 2821. In so finding, the Court observed that

> even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households we still could not agree with the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members

constitutes a rational effort to deal with these concerns.

Id. at 535-36. The Court pointed out that the statute already contained anti-fraud provisions and that it provided for strict criminal penalties. *Id.* at 536. Furthermore, the Court found that in "practical effect," the statute did not operate to further the prevention of fraud, since it only precluded groups that lived as one economic unit, shared common cooking facilities, and customarily purchased food in common. *Id.* at 537. The Court found that individuals with the financial means to alter their living arrangements could avoid the exclusion by sidestepping any one of the three conditions. For example, two wealthy unrelated individuals living together could manage to purchase their groceries separately. In so doing, they would effectively create two separate households, both eligible for assistance, and thereby evade the application of the statute. *Id.* This being the case, it could not truthfully be said that the purpose of the exclusion was to eliminate the operation of fraud in the food stamp program. Instead, the statute irrationally punished "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538.

In *Eisenstadt,* the Court invalidated on rational basis grounds a Massachusetts statute banning the distribution of contraceptives to unmarried persons. The state's highest court had defined the statute's purposes as the deterrence of premarital sex and the promotion of community health needs by regulating the distribution of potentially harmful articles. The Supreme Court looked behind the facial legitimacy of the state's proffered justifications and refused to accept that either rationale could "reasonably be regarded" as the purpose of the statute. 405 U.S. at 448-49. The Court found that the first purpose, deterring premarital sex, was "dubious" considering that Massachusetts law did not limit the distribution of contraceptives when used to prevent the

spread of disease rather than to prevent pregnancy. *Id.* (internal quotation omitted). And in allowing married persons to use contraceptives, the state's law made no effort to limit illicit sexual relations between married and unmarried persons. Thus, the proffered rational basis was "illogical to the point of irrationality." *Id.* at 451 (internal quotations omitted).[12]

The Court concluded that "the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim." *Id.* at 449, 92 S.Ct. 1029. The *Eisenstadt* Court also discounted the state's promotion of health argument as "both discriminatory and overbroad," and a transparent effort to escape the reach of the Court's holding in *Griswold v. State of Connecticut,* 381 U.S. 479 (1965). *Eisenstadt,* 405 U.S. at 450. The Court held on equal protection grounds that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." *Id.* at 453.

In *Cleburne,* the Court heard an equal protection challenge to a Texas city's zoning ordinance that required a special use permit in residential areas for the operation of a home for the mentally disabled. The city argued that the ordinance was justified by the "negative attitude of the majority of property owners" toward institutions for the mentally disabled and by "the fears of elderly residents" living near the institution. 473 U.S. at 448. It also defended the measure as an effort to serve the best interests of the

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[12] As the Court explained, if the state genuinely considered contraceptives to pose a health risk, it would have banned their use by both married and unmarried persons. Protecting only single persons from the alleged dangers of contraceptives, and even then only when used to prevent pregnancy rather than the spread of disease, was "illogical to the point of irrationality." *Eisenstadt,* 405 U.S. at 451 (internal quotations omitted).

mentally disabled themselves, arguing that the institution would be threatened by its location near a junior high school whose students might harass the residents, its setting on a flood plain, and its size and capacity. Finally, the city pointed to concerns over street congestion, fire hazards, neighborhood serenity, and potential liability arising out of the conduct of the mentally disabled. *Id.* at 449-50.

Again applying rational basis review, the Supreme Court first rejected the city's attempt to justify the statute by reference to a supposed communal aversion to the mentally disabled. "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding," the Court found, "are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* at 448.

With respect to the city's other arguments, the Court "did not discount the legitimacy of these interests, but rather found that, in creating the means used to carry out these interests, the city had adopted a classification that had no rational basis." *Williams v. Pryor,* 240 F.3d 944, 952 (11th Cir.2001) (discussing *Cleburne*). The city's fears that junior high school students would harass the residents could not be credited because the junior high school itself had thirty mentally retarded students in attendance. *Cleburne,* 473 U.S. at 449. The concern of a possible flood was not tenable because the zoning ordinance allowed nursing homes, homes for the elderly, sanitariums, and hospitals to be located in the same area without permits. *Id.* The city's fear of legal liability could not be credited because fraternities and boarding houses did not require a permit. *Id.* Moreover, fear of overcrowding in the institution was not reasonable when the city did not require permits to protect against crowding in other facilities. *Id.* at 450. Finally, there was no reason to believe that the institution would contribute to street congestion more than any other similar institution. What the

Court said of this last argument applied with equal force to all of the city's other rationales:

> [T]his record does not clarify how ... the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.

Id.

After discounting any connection between plausible legitimate government interests and the statute in question, the Court concluded that "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* In *Cleburne,* as in *Eisenstadt,* the Supreme Court indicated that it simply disbelieved that the purposes articulated by the state had any rational relationship to the ordinance and refused to accept the facial legitimacy of the city's proffered reasons. The Court held that none of the goals fit the class of persons targeted except by way of confirming that animus towards the mentally disabled had been the major impetus behind the statute.

Finally, in *Romer* the Court extended rational basis review to the area of anti-homosexual discrimination. Colorado argued that the amendment struck down in that case was justified by the state's interests in protecting the associational rights of landlords and employers with moral objections to homosexuality and in "conserving resources to fight discrimination against other groups." 517 U.S. at 635.

The Court found it "impossible to credit" these proffered purposes. *Id.* Noting that rational basis inquiry was meant to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law," *id.* at 633, the Court held that

> [e]ven laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that *outrun* and *belie* any legitimate justifications that may be claimed for it.

Id. at 635 (emphasis added). Because the amendment bore no credible relationship to the state's proffered legitimate justifications, the Court accepted "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. And it concluded that, whatever else might be said of the amendment, it "offended" the "conventional and venerable" principle that "a law must bear a rational relationship to a legitimate governmental purpose." *Id.* at 635.

In all four cases, the Court concluded that the asserted justifications were not rationally related to the classification. Thus, the Court *inferred* that animus was the motivation behind the legislation and established that such a motivation could not constitute a legitimate state interest.[13]

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[13] Judge Birch incorrectly claims that I have argued that these cases stand for the proposition that rational-basis review should focus on the *actual* reasons for enacting a statute. *See* Special Concurrence by Judge Birch to Denial of Rehearing *En Banc* at 1278-1280, 1281 n. 6, 1281- 1282. On the contrary, I recognize that if Florida's *post hoc* justifications were able to rationally account for its ban on homosexual adoption, then Florida's law might be constitutional notwithstanding some evidence in the legislative record that the state's actual motivation was animus. Thus, the suggestion that I have invented some alternative "animus/analysis" theory is a complete distortion of my position. *Id.* at 1278-1279. Instead, I merely contend that the Supreme Court's decisions in *Eisenstadt, Moreno, Cleburne,* and *Romer* require that we examine Florida's post hoc

As Justice O'Connor noted in *Lawrence,* "if these cases have *stare decisis* effect, Texas' sodomy law would not pass scrutiny under the Equal Protection Clause, regardless of the type of rational basis review that we apply," 123 S.Ct. at 2485. So too does Florida's law fail to survive any form of rational basis review. Here, there is no question that a politically unpopular group is being targeted, that the challenged legislation inhibits personal relationships, and that there is no legitimate rational relationship between Florida's proffered justifications and its sweeping categorical adoption ban against homosexuals.

B. Subjected to the Identical Analysis Used in *Eisenstadt*, *Cleburne*, *Moreno*, and *Romer*, the Florida Ban Would be Unconstitutional.

Like the justifications for the statutes in the cases discussed above, Florida's proffered justifications for the categorical ban here are false, do not rationally relate to the best interests of children, and are simply pretexts for impermissible animus and prejudice against homosexuals. The panel in *Lofton* credits the state's assertion that the statutory ban is

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rationales to determine if there is some conceivable legitimate government interest that can plausibly account for Florida's law. There is nothing novel about this kind of analysis. As Judge Birch himself recognizes, in certain circumstances, a court may *infer* that a statute is motivated by animus or irrational prejudice when the proffered rationales cannot rationally explain the actual operation of the statute. *Id.* at 1280-1281. Because animus and irrational prejudice are not legitimate governmental purposes, such a statute will fail rational-basis scrutiny. *Id.* at 1280-1282. I have simply applied these principles to the facts of this case, as I am required to do in faithfully applying Supreme Court precedent. As I explain in detail below, I do not believe Judge Birch has offered any plausible explanation for Florida's categorical determination that homosexuals are *inherently* and *always* unfit to serve as adoptive parents. I fail to see how any objective observer could think such a law is rational and consistent with the most basic, minimal notions of equal protection under law.

> designed to create adoptive homes that resemble the *nuclear family* as closely as possible. Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in *families with married mothers and fathers.* Such homes, Florida asserts, provide the *stability that marriage affords* and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a *vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling.* Florida argues that disallowing adoption into homosexual households, which are necessarily motherless or fatherless and *lack the stability that comes with marriage,* is a rational means of furthering Florida's interest in promoting adoption by marital families.

358 F.3d at 818-19 (emphasis added).

This rhetoric boils down to the argument that Florida prohibits homosexuals from being considered as adoptive parents because it wishes to place children with married couples. It wishes to do so for two alleged reasons: (1) to provide "stability" in the home, which the panel apparently believes can only be provided by married couples representing the "nuclear" family model; and (2) to properly shape heterosexual "sexual and gender identity," which the panel asserts should be accomplished by married couples.

Like the proffered reasons in *Eisenstadt,* which were "so riddled with exceptions" that the state's asserted goal could not "reasonably be regarded as its aim," 405 U.S. at 449, the state's proffered rational basis for the statute here

(providing adopted children with married couples as parents) cannot be legitimately credited because it fails the equal protection requirement that "all persons similarly situated should be treated alike." *Cleburne,* 473 U.S. at 439. As noted at the beginning of this dissent, it is plainly false that Florida has established a preference for "married mothers and fathers" as adoptive parents. The 1977 statute prohibiting homosexual adoption expresses no preference whatsoever for married couples, expressly permitting an "unmarried adult" to adopt. Fla. Stat. § 63.042(1)(b) (2003). Moreover, the DCF administrative regulations that are inextricably tied to Florida's adoption statutes do not prefer married over single candidates for adoption.[14] In short, the Florida legislature never did, and the Florida executive no longer does, express a preference for married over unmarried couples or singles in the area of adoption. The fact that Florida places children for adoption with single parents directly and explicitly contradicts Florida's post hoc assertion that the ban is justified by the state's wish to place children for adoption only with "families with married mothers and fathers." This contradiction alone is enough to prove that the state's alleged reasons are "illogical to the point of irrationality." *Eisenstadt,* 405 U.S. at 451.

However, instead of acknowledging this glaring gap between the ban on homosexual adoption and the state's purported justification, as did the Supreme Court in

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[14] Fla. Admin. Code Ann. r. 65C-16.005 (2004). It should also be noted that even under the earlier version of the DCF regulations unmarried couples were only barred from adopting *jointly.* Fla. Admin. Code Ann. r. 65C-16.005 (2002). As single persons, heterosexuals have never been categorically barred from adopting in Florida. The April 2002 revision of the regulations provided that DCF "will accept the application of single persons seeking to adopt a child." This remains true under the current regulations. Defendants and plaintiffs agree that over twenty-five percent of adoptions out of foster care in Florida are by single people, and that in the district covering Miami-Dade County, this figure is over forty percent. R. at 124 (Stipulation at ¶¶ 24-25).

invalidating the statutes in *Eisenstadt, Moreno, Cleburne,* and *Romer,* the *Lofton* panel stretches mightily to construct a hypothetical to bridge this gap. "It is not irrational," the panel opines, "to think that heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment." *Lofton,* 358 F.3d at 822. The panel's contrived hypothetical offering blatantly ignores not only the absence of any preference in Florida's statute for married couples but also the realities of the adoption process. Evaluations of prospective parents are based on present, not "eventual," status and conditions.[15] Florida does not ask for a commitment of plans to marry someday in the future and permits single adults to adopt without making inquiry into whether they have immediate, or even long-range, marriage plans or prospects. Indeed, that many individuals choose to adopt outside of marriage is an indication that adoption and commitment to a permanent adult relationship are completely separate decisions.[16] Moreover, experience leads one to believe that single heterosexuals who adopt are less likely to marry in the future, not more likely. Finally, this speculative hypothesis also fails to take account of "non-practicing homosexuals" who are not likely to marry but can adopt under Florida

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[15] In a different context, a much more plausible hypothetical clarifies the reality of placement on the basis of existing conditions. If an applicant were unemployed and had no immediate job prospects or other present means of financially supporting a child, no placement agency would even consider permitting an adoption in the hopes that "some day" the adopting parent would be able to obtain employment, even if the applicant were a college graduate or had other job skills. The relevant inquiry has to be the conditions into which the child will be placed *now.*

[16] That the state endorses adoption by single parents in the same fashion as married couples reflects the fact that the best interests of the child depend upon considerations other than access to a two-parent household. Indeed, in many cases homosexual couples can provide a stable, two-parent household that singles, by definition, cannot.

law.[17] The Supreme Court found the state's arguments in *Eisenstadt* to be a futile and transparent move to escape the reach of the Court's decision in *Griswold.* 405 U.S. at 450. The hypothetical posited by the *Lofton* panel demonstrates a comparable and equally transparent attempt to ignore the equal protection cases applicable here.

In addition to its failure to meaningfully distinguish homosexuals from single heterosexuals, the panel never explains why it is rational to believe that homosexuals, as a class, are unable to provide stable homes and appropriate role models for children. With respect to the first of these arguments, there is absolutely no record evidence to show that homosexuals are incapable of providing the permanent family life sought by Florida. To the contrary, as the facts in this case suggest, many children throughout the country are lovingly and successfully cared for by homosexuals in their capacity as biological parents, foster parents, or legal guardians.[18] Furthermore, it is not marriage that guarantees a stable, caring environment for children but the character of the individual caregiver.[19] Indeed, given the reality of foster

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[17] *Cox,* 627 So.2d at 1215, held that for purposes of the statute at issue, the term "homosexual" is "limited to applicants who are known to engage in current, voluntary homosexual activity."

[18] Yet another disturbing aspect of Florida's ban is that, while permitting single persons to adopt, this statute could conceivably ban the homosexual partner of a biological parent from adopting the partner's biological child.

[19] The most recent U.S. Census Bureau statistics indicate that about 50% of first marriages for men under age 45 may end in divorce. The figures for the first marriages of women in the same age group range between 44 and 52%. Rose M. Kreider and Jason M. Fields, "Number, Timing, and Duration of Marriages and Divorces: Fall 1996," *Current Population Reports* (P70-80) at 18. Washington, DC: U.S. Census Bureau, 2001. These statistics are confirmed by the findings of the National Center for Health Statistics, which released a report in 2001 finding that 43% of first marriages end in separation or divorce within fifteen years. Matthew Bramlett & William Mosher, "First Marriage Dissolution, Divorce, and

care in Florida, the statute actually operates to impede, rather than promote, the placement of a child into a permanent family. Florida's statute expresses a clear intent "to protect and promote the well-being of persons being adopted ... and to provide to all children who can benefit by it a permanent family life." Fla. Stat. § 63.022(3) (2003). Yet, Florida's foster care system has a backlog of more than 3,400 children in it, far more than the number of married couples eligible to adopt.[20] Given this backlog, the state's ban on gay adoption does nothing to increase the number of children being adopted, whether by married couples or anyone else. The

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Remarriage: United States," *Advance Data from Vital and Health Statistics* (2001). As of 2001, Florida ranked with Mississippi as the state with the sixth highest divorce rate in the nation. U.S. Census Bureau, *Statistical Abstract of the United States* (2003) at 100. This ranking includes the District of Columbia but not California, Colorado, Indiana, and Louisiana, which did not report divorce statistics to the Census Bureau. As Florida Statute § 63.042(1)(b) makes explicit, the fact that two persons are married does not make them fit parents or tell us how or even whether they will fulfill the responsibilities of caring for children. There is nothing selective about the institution of marriage; all kinds of persons who would not be regarded as suitable adoptive parents are admitted to the responsibilities of marriage, and marriage does not insulate spouses or children from the neglect and abuse that occur within it. In its annual national report on child abuse and neglect mandated under the Child Abuse and Prevention and Treatment Act ("CAPTA"), the U.S. Department of Health and Human Resources found that 81% of the perpetrators were parents defined as birth parents, adoptive parents, and stepparents. Similarly, in Florida, the report indicates that 78% of all reported child maltreatment cases were committed by parents. *See* Admin. for Children & Families, U.S. Dep't of Health & Human Serv., *Child Maltreatment 2002: Reports from the States to the National Child Abuse and Neglect Data Systems--National Statistics on Child Abuse and Neglect* (2004). In 2002, a total of 121,834 cases of domestic violence were reported to police law enforcement agencies in the state of Florida. Of that number, 26% (31,874) of the victims were spouses while 8% (9,190) of the victims were children. *See* Fla. Statistical Analysis Ctr., Fla. Dep't of Law Enforcement, *Florida Uniform Crime Report* (1992-2002).

[20] R. at 124 (Stipulation at ¶ 15).

state is evidently willing to allow children to live with the potential uncertainties of several foster-care placements rather than enjoy the security and certainty of an adoptive home with one or two caring parents who are also homosexual.[21]

Nor does the panel offer a reason for why it is rational to credit the state's second argument: that homosexuals are incapable of providing good role models. The panel claims that "[heterosexual] children will need education and guidance after puberty concerning relationships with the opposite sex.... It is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood." *Lofton,* 358 F.3d at 822 (quoting *Cox,* 627 So.2d at 1220, which predates *Lawrence* and relies on *Bowers*). Is the panel suggesting that heterosexual parents are necessary in order to tell children about their own dating experiences after puberty? For anyone who has been a parent, this will no doubt seem a very strange, even faintly comical, claim. There is certainly no evidence that the ability to share one's adolescent dating experiences (or lack thereof) is an important, much less essential, facet of parenting. The difficult transition to adulthood is a common human

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[21] In its August 2001 "Child and Family Services Review Final Assessment," the U.S. Department of Health and Human Services found that Florida failed to meet the national standard for stability of foster care placements (measured in terms of the percentage of children who experience more than two placements during their first twelve months of placement). The same assessment found that, in over 40% of the cases reviewed, Florida failed to meet its own statutorily specified permanency goals for children in its foster care system. (Florida law requires that a permanent living situation be sought for each child who has remained in out-of-home care for twelve consecutive months, and that progress towards this permanency goal be reviewed on a biannual basis.) Admin. for Children & Families (Region IV), U.S. Dep't of Health & Human Serv., *Child and Family Services Review Final Assessment* (2001) at 14-17.

experience, not an experience unique to human beings of a particular race, gender, or sexual orientation. It is downright silly to argue that parents must have experienced everything that a child will experience in order to guide them. Indeed, that will generally not be the case. For example, immigrant parents help their children adjust to a world and culture they have not known. It cannot be suggested that such individuals are unfit to parent any more than it could be suggested that a mother is unfit to parent a son or that a white person is unfit to parent an African-American child.[22] Furthermore, the panel's argument completely neglects to consider the situation of gay children of heterosexual parents. Children simply need parents who will love and support them.

In addition to this contrived argument about teenage dating advice, the panel suggests that placing children with homosexual parents may make it more likely that children will become homosexual, referring cryptically to the "vital role that dual-gender parenting plays in *shaping sexual and gender identity* and in providing heterosexual role modeling." *Lofton,* 358 F.3d at 818 (emphasis added). In our democracy, however, it is not the province of the State, even if it were *able* to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities. This approach views homosexuality in and of itself as a social harm that must be discouraged, and so demeans the dignity of homosexuals, something that *Lawrence* specifically proscribes. *Lawrence,* 123 S.Ct. at 2482, 2484 (finding that gays and lesbians are "entitled to respect for their private lives.").

Finally, the panel also intimates in dicta that Florida has a legitimate interest in defending public morality by expressing disapproval of homosexuality. *Lofton,* 358 F.3d at

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[22] Nor, for example, could anyone responsibly suggest that priests must be married in order to provide marriage counseling, or that psychiatrists must have suffered every ill they treat.

819 n. 17. But moral disapproval of disfavored groups "is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Lawrence,* 123 S.Ct. at 2486 (O'Connor, J., concurring). *Moreno* established that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate government interest." 413 U.S. at 534. As the *Lawrence* Court made clear, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." 123 S.Ct. at 2480 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 850 (1992)).

Nor may the state hide behind a suggestion that it is attempting to protect children from disapproval at large in society. Florida courts have specifically rejected moral disapprobation of homosexuality as a justification for granting custody of a child to one or another biological parent. *See Maradie v. Maradie,* 680 So.2d 538 (Fla.Dist.Ct.App.1996) (holding that a lower court's finding as to the effect of a homosexual environment on a child is not a proper subject of judicial notice, and that it requires reversal and remand for a new custody determination); *Jacoby v. Jacoby,* 763 So.2d 410 (Fla.Dist.Ct.App.2000) (citing *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984), and holding that a lower court's reliance on perceived biases against homosexuality is an improper basis for a residential custody determination).

Ultimately, the breadth of the categorical adoption ban "outrun[s] and belie[s]" the state's asserted justifications. *Romer,* 517 U.S. at 635. As *Moreno* discounted the state's asserted reason of protecting the public from fraud because the state had adequate anti-fraud provisions with strict penalties, Florida's rationale should likewise be discounted, given that Florida has explicitly tailored provisions to protect children placed in adoptive homes. Florida Statute §

63.092(3) (2003) requires a preliminary and thorough home study of prospective adoptive parents and the state uses its full power to screen all applicants and bar adoption by anyone not deemed to be a fit parent. The adoption statute accords everyone other than homosexuals the benefit of an individualized consideration that is directed toward the best interests of the child. Child abusers, terrorists, drug dealers, rapists and murderers are not categorically barred by the adoption statute from consideration for adoptive parenthood in Florida.[23] On the other hand, individuals who take children into their care, including unwanted children, such as those who are HIV-positive, and who have raised them with loving care for years are categorically barred from adopting if they happen to be homosexual. In the context of adoption, this disparity of treatment on the face of the statute amounts to the purest form of irrationality.

Just as troubling, even where a foster relationship is comparable to the most stable and caring of biological parent-child relationships, the state may remove a child from that relationship simply because the parent is a homosexual.[24] In light of these considerations, it is no exaggeration to say that the best interests of the child not only fail to justify or support the ban on homosexual

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[23] The statute's preliminary home study requirement includes a check of the DCF central abuse registry and statewide criminal records. Fla. Stat. § 63.092(3)(b) (2003). DCF administrative regulations and Florida's labor code (not the Florida adoption statute) bar those convicted of crimes against children and certain crimes of violence from adopting. But these same provisions permit persons with a felony conviction for physical assault, battery, or a drug-related offense to adopt if the offense was committed more than five years before. Fla. Admin. Code Ann. r. 65C-16.005(9)(a)(3) (2003) (referencing Fla. Stat. § 435.045(1)(a)(1) & (2) (2001)).

[24] In response to the ACLU's June 2001 request for a guarantee that Doe would not be taken away from Lofton, the DCF responded that it "is left with no legal alternative but to make appropriate efforts to place [Doe] for adoption." Appellees' Br. at 11 (quoting R4-132, Ex. G).

adoption, but that those interests are actually subordinated to the state's evident need to discriminate on the basis of sexual orientation.

The Equal Protection Clause does not permit a classification of persons undertaken for its own sake. "[C]lass legislation ... [is] obnoxious to the prohibitions of the Fourteenth Amendment...." *Civil Rights Cases,* 3 S.Ct. 18, 30 (1883). When there is no reason to believe that the disadvantaged class is different, in relevant respects, from similarly situated classes, the Supreme Court has held that irrational prejudice can be inferred as the basis for a classification. *Cleburne,* 473 U.S. at 449-50, 105 S.Ct. 3249. Here, irrational prejudice can be inferred as the basis for this classification because there is no difference in relevant respects between single heterosexual persons and single homosexual persons with reference to the state's purported justification for the ban in the statute. Moreover, when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. *Romer,* 517 U.S. at 632, 635. Since Florida's rationale is not plausible given that single persons may adopt, the inference is obvious that Florida's decision to single out homosexuals is based solely on anti-gay animus. Unsurprisingly, animus is just what the legislative history of Florida's ban confirms.

C. Legislative History

The Florida statute was enacted after an organized and relentless anti-homosexual campaign led by Anita Bryant, a pop singer who sought to repeal a January 1977 ordinance of the Dade County Metropolitan Commission prohibiting discrimination against homosexuals in the areas of housing, public accommodations, and employment. Bryant organized a drive that collected the 10,000 signatures

needed to force a public referendum on the ordinance.[25] In the course of her campaign, which the Miami Herald described as creating a "witch-hunting hysteria more appropriate to the 17th century than the 20th,"[26] Bryant referred to homosexuals as "human garbage."[27] She also promoted the insidious myth that schoolchildren were vulnerable to molestation at the hands of homosexual schoolteachers who would rely on the ordinance to avoid being dismissed from their positions.[28]

In response to Bryant's efforts, Senator Curtis Peterson introduced legislation in the Florida Senate banning both adoptions by and marriage between homosexuals. The legislative history reveals the very close and utterly transparent connection between Bryant's campaign and the Peterson bills. At the May 3, 1977 hearings of the Senate Judiciary Civil Committee, for example, Senator Peterson observed that "it is a possible problem, constantly in the news."[29] Senator George Firestone commented that "this [gay rights controversy] has totally polarized [my] community unnecessarily."[30] And Senator Don Chamberlin explicitly tied the Bryant campaign to the proposed ban on homosexual adoption, arguing that the latter would never have arisen without the ruckus over the Dade County

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[25] *See generally* "Battle over Gay Rights," *Newsweek,* June 6, 1977.

[26] Bill Paterson, "Fear Intense on Both Sides of Gay Rights Vote Tuesday," Wash. Post, June 6, 1977.

[27] "Battle over Gay Rights," Newsweek, June 6, 1977; Laura Benkov, Reinventing the Family: The Emerging Story of Lesbian and Gay Parents 83 (1994).

[28] "Battle over Gay Rights," *Newsweek,* June 6, 1977.

[29] Tape recording of the Florida Senate Judiciary Civil Committee proceedings, May 3, 1977 (copy of original in the Florida State Archives).

[30] *Id.*

antidiscrimination ordinance.[31] The impetus for Florida's adoption ban exactly parallels the impetus for the state constitutional amendment struck down in *Romer*. *See Romer*, 517 U.S. at 623-24 ("The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from [the campaigns against antidiscrimination] ordinances that had been passed in various Colorado municipalities."); *Moreno*, 413 U.S. at 534 (legislative history indicative of purpose to prevent "hippies" and "hippie communes" from participating in food stamp program).

The Florida legislature's intention to stigmatize and demean homosexuals is further confirmed by the passage, on May 30, 1977, of a House amendment that allowed for public disclosure of the reasons for a denial of an application for adoption. The explicit purpose of this amendment was to protect non-homosexual prospective parents whose applications were denied for reasons other than sexual orientation from the stigma of being thought to be homosexual.[32] The Senate provided added coverage against stigmatization for non-homosexual applicants with its May 31 amendment requiring courts, when dismissing a petition for adoption, to state with specificity the reasons for doing so.[33]

Throughout all of these proceedings, it could hardly be said that there was any discussion of the "best interests of the child" standard. The only legislator who bothered to

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[31] *Id.; see also* Tape recording of the Florida House of Representatives Judiciary Committee proceedings, May 19, 1977 (copy of original in the Florida State Archives) (representative stating that "the majority of the committee supports Ms. Bryant and her move to do what she is doing.").

[32] Tape recording of the Florida House of Representatives proceedings, May 30, 1977 (copy of original in the Florida State Archives).

[33] Tape recording of the Florida Senate proceedings, May 31, 1977 (copy of original in the Florida State Archives). This Senate amendment is now codified as Fla. Stat. § 63.142(3)(b) (2003).

inject the concept was Senator Chamberlin, who tried to block the bill, noting that there was no incompatibility at all between homosexuals and the best interests of children.[34] Another senator simply stated that "we have a responsibility to provide children with a wholesome atmosphere."[35]

As the House and Senate gave their final approval to the Peterson bills on May 31, Senator Peterson stated that his bills were a message to homosexuals that "[w]e're really tired of you. We wish you would go back into the closet."[36] On June 8, 1977, exactly one day after Dade County voters repealed the antidiscrimination ordinance,[37] the Governor of Florida signed the Peterson bills into law, in what can only be seen as a deliberate acknowledgment of the orchestration between Bryant's campaign and the legislature's actions.[38] In short, the legislative history shows that anti-gay animus was the major factor--indeed the sole factor--behind the law's promulgation, thereby confirming that the standard of review in this case is controlled by *Eisenstadt, Cleburne, Romer,* and *Moreno.*

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[34] Tape recording of the Florida Senate Judiciary Civil Committee proceedings, May 3, 1977.

[35] Tape recording of the Florida Senate proceedings, May 11, 1977 (copy of original in the Florida State Archives).

[36] "Gay Bills Pass Both Chambers," Florida Times Union, June 1, 1977. Senator Peterson is also quoted in this UPI report as stating that "[t]he problem in Florida is that homosexuals are surfacing to such an extent that they're beginning to aggravate the ordinary folks, who have a few rights of their own."

[37] The antidiscrimination ordinance, however, has since been repassed by the Miami-Dade County Commission. *See* Miami-Dade County Code of Ord., Ch. 11A, Art. 1(1) (1997-98) ("It is hereby declared to be the policy of Dade County ... to eliminate and prevent discrimination in employment, family leave, public accommodations, credit and financing practices, and housing accommodations because of ... sexual orientation.").

[38] Assoc. Press, June 8, 1977.

Whereas the Texas sodomy statute struck down in *Lawrence* treated homosexuals as criminals, Florida's ban on gay adoption treats criminals with more dignity than homosexuals. Nothing more clearly raises the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *Romer,* 517 U.S. at 634, than this disparity of treatment.

II. SUBSTANTIVE DUE PROCESS

Although I believe that this case can be resolved solely on equal protection grounds, without considering *Lawrence,* I address the independent basis of substantive due process because *Lofton* incorrectly concludes that *Lawrence* did not recognize a fundamental right to or liberty interest in sexual privacy. As I explain below, *Lawrence* held that consenting adults have a right under the Due Process Clause to engage in private sexual conduct, including homosexual conduct. Because Florida's law punishes the exercise of this right by denying all active homosexuals the ability to be considered as adoptive parents, we are required to subject Florida's law to heightened scrutiny--not the cursory, attempted rational-basis analysis the panel employs. In addition to its failure to apply heightened scrutiny, the panel makes further errors of law in attempting to evade the application of *Lawrence.* It makes erroneous statements about the proper use of history and tradition in a substantive due process analysis, and mistakenly claims that *Lawrence* does not apply here because adoption is a privilege and not a right, and because Florida's statute is a civil rather than criminal law. These reasons are not only unsupported by, but are directly contrary to, Supreme Court precedent.

A. *Lawrence* Reaffirmed a Fundamental Right or Liberty Interest to Engage in Private Intimate Sexual Conduct.

The doctrine of substantive due process requires, first, that *every* law must address in a relevant way only a

legitimate governmental purpose.[39] In other words, no law may be arbitrary and capricious but rather must address a permissible state interest in a way that is rationally related to that interest. As a consequence, any law challenged as violating a fundamental right or liberty interest must survive rational-basis review.

However, the Supreme Court has found that some decisions are so fundamental and central to human liberty that they are protected as part of a right to privacy under the Due Process Clause, and that the government may constitutionally restrict these decisions only if it has *more* than an ordinary run-of-the-mill governmental purpose.[40] Included within this right to privacy is the ability to make decisions about private sexual matters.[41]

In invalidating the sodomy statute at issue in *Lawrence,* the Court reaffirmed this right of sexual privacy, finding that private homosexual conduct is likewise

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[39] Judge Birch is, thus, mistaken that I view substantive due process as always synonymous with fundamental-rights analysis. *See* Special Concurrence by Judge Birch to Denial of Rehearing *En Banc* at 1285-1286. I agree that rational-basis review is also part of the doctrine of substantive due process. The source of my disagreement with Judge Birch is based on his attempt to artificially downgrade the *Lawrence* decision to a rational-basis holding, which, as I explain *infra,* fails to provides a coherent and plausible interpretation of the entire opinion.

[40] The Supreme Court has explained that this right includes the ability of adults to make decisions relating to marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); family relationships, *Prince v. Massachusetts,* 321 U.S. 158, 165-66 (1944); procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942); contraception, *Griswold,* 381 U.S. at 485-86, and *Eisenstadt,* 405 U.S. at 453-55; child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925) and *Meyer v. Nebraska,* 262 U.S. 390, 399-400 (1923); and abortion, *Roe v. Wade,* 410 U.S. 113, 153 (1973).

[41] *See, e.g., Carey v. Population Services Int'l,* 431 U.S. 678, 685 (1977) and *Griswold,* 381 U.S. at 485- 86 (right to use contraception); *Casey,* 505 U.S. at 869, 112 S.Ct. 2791 (right to seek out an abortion).

encompassed within it.[42] The Court stated that the Due Process Clause gives homosexuals "the full right to engage in [private sexual] conduct without intervention of the government." *Lawrence,* 123 S.Ct. at 2484. There can be no doubt that the Court's conclusion here is a binding holding. From the outset of its opinion, the Court stated that it had granted certiorari specifically to consider "[w]hether Petitioners' criminal convictions for *adult consensual sexual intimacy in the home* violate their *vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?*" *Id.* at 2476 (internal quotation marks and citation omitted) (emphasis added). While the Court also granted certiorari to address whether Texas's sodomy statute violated the Equal Protection Clause,[43] the Court explicitly decided to rest its holding on a substantive due process analysis because it found that if a sodomy law "remain[ed] unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn

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[42] From its opening paragraph, the Court emphasized that

> [l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.... The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Lawrence, 123 S.Ct. at 2475.

[43] Unlike the sodomy statute at issue in *Lawrence,* which only applied to homosexual conduct, the Georgia statute in *Bowers* criminalized acts of sodomy engaged in by both heterosexuals and homosexuals. *See Bowers v. Hardwick,* 478 U.S. 186, 188 n. 1 (1986). The *Lawrence* Court indicated that the sodomy statute before it could have been invalidated using an equal protection analysis. 123 S.Ct. at 2482. Indeed, this was the conclusion of Justice O'Connor in her concurrence. *Id.* at 2484-88 (O'Connor, J., concurring).

for equal protection reasons." *Id.* at 2482.[44] Accordingly, the Court wrote that the "case should be resolved by determining whether the petitioners were free as adults to engage in the private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Id.* at 2476.

In resolving this issue, the Court retraced its substantive due process jurisprudence by discussing the fundamental rights cases of *Griswold, Eisenstadt,*[45] *Roe,* and *Carey* and emphasized the breadth of their holdings as involving private decisions regarding intimate physical relationships. *Id.* at 2476-77. Beginning with *Griswold,* the *Lawrence* Court found that its prior decisions confirmed "that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person" and "that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." *Id.* at 2477 (summarizing *Griswold, Eisenstadt, Roe,* and *Carey*).

Because of the existence of this right to make private decisions regarding sexual conduct, the *Lawrence* Court was compelled to overrule the anomaly of *Bowers,* which had failed to acknowledge this right in permitting Georgia to criminalize sodomy. *See Bowers,* 478 U.S. at 194-96, 106

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[44] The *Lawrence* majority went on to state that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 123 S.Ct. at 2482.

[45] Although *Eisenstadt* was decided on equal protection grounds, *Lawrence* noted that *Eisenstadt* "went on to state the fundamental proposition that the law impaired the exercise of ... personal rights." 123 S.Ct. at 2477. Further, while *Lawrence* cited *Romer v. Evans* 517 U.S. 620 (1996), as an example of how *Bowers* had been cast into doubt, the Court immediately declined to decide the case under *Romer* 's equal protection rationale, instead insisting that the decision be resolved on substantive due process grounds. *Id.* at 2482.

S.Ct. 2841. *Lawrence* found that at the time of *Bowers* the Court's prior holdings had already made "abundantly clear" that individuals have a right to make decisions "'concerning the intimacies of their physical relationship [s], even when not intended to produce offspring.'" *Lawrence,* 123 S.Ct. at 2483 (quoting *Bowers,* 478 U.S. at 216 (Stevens, J., dissenting)).[46] On this basis, the Court concluded that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence,* 123 S.Ct. at 2484.[47]

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[46] In overruling *Bowers, Lawrence* explained that

> our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Id. at 2481 (quoting *Casey,* 505 U.S. at 851). The Court unequivocally stated that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right." *Id.* at 2482.

[47] Given the *Lawrence* Court's statement in 2003, I fail to understand Judge Birch's reliance on a footnote from the Supreme Court's 1977 decision in *Carey,* where the Court indicated in dicta that it had not "definitively answered" the extent to which the Due Process Clause protects the private sexual conduct of consenting adults. Special Concurrence by Judge Birch to Denial of Rehearing *En Banc* at 1281-1283 (citing *Carey,* 431 U.S. at 688 n. 5). Obviously, *Carey* does not resolve in any way the meaning of a case that comes twenty-six years later. Nor does it prevent *Lawrence* from answering the very question posed in *Carey* 's footnote. As I discuss extensively in this dissent, *Lawrence* does precisely this in affirming the right of consenting adults to make private sexual decisions. As I also explain, this could not have been a new right. *Carey* 's footnote notwithstanding, the *Lawrence* Court determined that its pre-*Bowers* decisions, properly understood from its

In overruling *Bowers*, *Lawrence* found that *Bowers* "misapprehended the claim of liberty there presented" when it framed the issue before it as whether the Constitution protects "a fundamental right to engage in consensual sodomy":

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. *The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.*

Lawrence, 123 S.Ct. at 2478 (emphasis added). Just as marriage involves much more than simply the right to have sexual intercourse, the right to participate in a homosexual relationship extends far beyond the ability to engage in homosexual sodomy. *Bowers* was therefore wrong to have focused on a particular sexual act instead of upon the right to sexual privacy which encompasses acts of adult consensual sexual intimacy.

Lawrence indicated that the question that *Bowers* should have asked is whether adults have a right to engage in

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later vantage point, had already recognized a right to sexual privacy. This is the only way to make sense of the *Lawrence* Court's statements that *Bowers* was "not correct when it was decided," and that its decisions before *Bowers* had already made "abundantly clear" that adults have a right to make decisions "concerning the intimacies of their physical relationship[s]." *Lawrence*, 123 S.Ct. at 2483-84 (internal quotation marks and citation omitted).

"private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Id.* at 2476. In answering this question, *Lawrence* expressly adopted the reasoning of Justice Stevens' dissent in *Bowers:*

> [I]ndividual decisions by married persons, *concerning the intimacies of their physical relationship,* even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Id. at 2483 (quoting *Bowers,* 478 U.S. at 216 (Stevens, J., dissenting)) (emphasis added) (internal quotation marks omitted). Because the private conduct at issue in *Lawrence* also concerned the "intimacies" of a "physical relationship," the Court held that the petitioners have a right to engage in private sexual conduct without government interference. *Id.* at 2484.

The *Lawrence* Court's answer to its question of whether adults have a right to engage in private sexual conduct--the question it granted certiorari to answer and which it found was necessary to resolve the case--is binding precedent and should control the outcome here. While the *Lofton* panel concedes that "substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct," *Lofton,* 358 F.3d at 815, it fails to consider the ramifications of such a holding. Without defining what other kind of right it could be, *Lofton* maintains that "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right." *Id.* at 817. Indeed, *Lawrence* did not establish a *new* fundamental right. Rather, given the Court's statement that *Bowers* was not correct when it was decided, the *Lawrence*

Court *reiterated the longstanding right* of consenting adults to engage in private sexual conduct.

B. Lofton's Arguments for Why *Lawrence* is a Rational Basis Case are Unsupported by any Supreme Court Precedents.

In addition to its insistence that *Lawrence* did not announce a "new" right to sexual privacy, the panel offers four arguments for its skewed reading of *Lawrence* as a pure rational-basis decision. First, it claims that *Lawrence* did not "locate this right [to sexual privacy] directly in the Constitution." *Id.* at 816. Second, it argues that *Lawrence* failed to provide the "careful description" of the asserted right required by *Glucksberg*. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted). Third, the panel claims that *Lawrence* failed to identify a history and tradition of affirmative protection of the right to engage in homosexual conduct. *Id.* at 816 n. 15. Finally, the panel argues that *Lawrence* could not have recognized a fundamental right or liberty interest entitled to heightened scrutiny because of a single sentence in the opinion indicating that the Texas sodomy statute furthered no legitimate state interest. *Id.* at 817.

Regarding the panel's first argument, as noted earlier, the *Lawrence* Court stated that the petitioners' "*right to liberty under the Due Process Clause* gives them the full right to engage in their [private sexual] conduct without intervention of the government." 123 S.Ct. at 2484 (emphasis added). The Court could not have been more clear that the petitioners' right to engage in private sexual conduct was located in the Due Process Clause. Thus, the panel's argument that *Lawrence* did not "locate this right directly in the Constitution" is meritless.

The panel's second argument that *Lawrence* did not provide the "careful description" of the right required by *Glucksberg* is also untenable given that the *Lawrence* Court

was at pains to describe how *Bowers* had misframed the question in that case in terms of whether there was a fundamental right to engage in consensual homosexual sodomy. As indicated above, *Lawrence* explained that the narrow framing of the question in *Bowers* "demean[ed] the claim" set forth and "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake" in that case. *Id.* at 2478 (*Bowers* "misapprehended the claim of liberty there presented to it"). The *Lawrence* Court explained that "[t]he laws involved in *Bowers* and here are, to be sure, statutes that *purport to do no more than prohibit a particular sexual act.* Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* (emphasis added). Thus, *Lawrence* demonstrates that the "careful description" of a liberty interest required by *Glucksberg* will not necessarily be synonymous with framing the liberty interest in the most narrow fashion possible. The panel has ignored this important clarification of the *Glucksberg* analysis required by the Court's subsequent decision in *Lawrence.* Inexplicably, given its purported interest in a "careful description" of the asserted right, the panel also fails to recognize that part of *Lawrence* in which the Court clearly states what the right at issue is and is not about for purposes of guiding future courts:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each

other, engaged in sexual practices common to a homosexual lifestyle.

Id. at 2484.[48]

Third, the panel further ignores how *Lawrence* clarifies *Glucksberg* 's treatment of the role of history and tradition in identifying a fundamental right or liberty interest. The panel misreads *Glucksberg* to say that the only relevant historical inquiry is whether there has been a tradition of laws affirmatively protecting the conduct at issue. *Lofton,* 358 F.3d at 816 n. 15. The panel then argues that while *Lawrence* "devote[d] considerable attention to history and tradition," it did so only to demonstrate that there had not been a "history of enacting, and regularly enforcing, laws specifically directed at private homosexual conduct." *Id.* Apparently in the panel's view, this was a superfluous inquiry, devoid of legal meaning. According to the panel, the Supreme Court should have asked "whether there has been a deeply rooted tradition and history of *protecting* the right to homosexual sodomy or the right to private sexual intimacy." *Id.*

The panel's belief that a history of state non-interference in the private sexual lives of homosexual adults cannot, as a matter of law, serve as the basis for recognizing a right to sexual privacy is entirely unsupported by any Supreme Court case. The panel has simply made up a new constitutional requirement that there must be a history of affirmative legislative protection before a right can be judicially protected under the Due Process Clause. Such a

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[48] Judge Birch makes inconsistent use of this passage. On the one hand, he uses it to argue that *Lawrence* cannot possibly extend to the facts of the instant case--an argument that, for reasons described in Part II.C below, is untenable. *See* Special Concurrence by Judge Birch to Denial of Rehearing *En Banc* at 1285-1286. On the other hand, he overlooks this passage when it comes to arguing that *Lawrence* did not provide a careful description of the scope of the right at issue. *Id.* at 1283-1284.

requirement ignores not only *Lawrence,* but an entire body of Supreme Court jurisprudence. Had the Supreme Court required affirmative governmental protection of an asserted liberty interest, all of the Court's privacy cases would have been decided differently.[49] Equally significantly, the panel fails to heed the *Lawrence* Court's instruction that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." 123 S.Ct. at 2480 (internal quotation marks and citation omitted). As *Lawrence* stated:

> [W]e think that our laws and traditions in the past half-century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

Id. Thus, *Lawrence* elucidates the *Glucksberg* discussion of the proper use of history and tradition in more than one sense. In addition to clarifying that history and tradition do not themselves resolve the due process inquiry, *Lawrence* establishes that recent trends and practices are as important as more distant ones in defining the existence and scope of a liberty interest. The panel's discussion of history and tradition is outdated in both of these respects.

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[49] For instance, there was no lengthy tradition of protecting abortion and the use of contraceptives, yet both were found to be protected by a right to privacy under the Due Process Clause. In *Roe,* the Court's historical analysis of Anglo-American statutory and common law served to provide evidence of the relatively recent (late nineteenth-century) vintage of state restrictions on abortion, not to demonstrate a tradition of affirmative protection of the right to an abortion. 410 U.S. at 132-41, 93 S.Ct. 705. Despite the lack of a history of protecting the right to abortion, the *Roe* Court nevertheless held that the "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

Fourth and finally, the panel insists that, no matter how hard *Lawrence* tries, it cannot have involved a liberty interest that requires heightened scrutiny because of a single reference to the phrase "legitimate state interest" towards the end of the *Lawrence* opinion. *Lofton,* 358 F.3d at 817 (quoting *Lawrence,* 123 S.Ct. at 2484) (internal quotation marks omitted). The sentence in question stated that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence,* 123 S.Ct. at 2484. The panel misconstrues even this solitary fragment of the *Lawrence* opinion. The mere presence of the phrase "legitimate state interest" does not mean that heightened scrutiny is not applicable, as can be seen by its use in conjunction with the application of heightened scrutiny. As the Supreme Court has explained, "[w]here certain *fundamental rights* are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the *legitimate state interests* at stake." *Roe,* 410 U.S. at 155 (emphasis added) (internal citations and quotation marks omitted).[50] Once the *Lawrence* Court found that the Texas sodomy statute completely proscribed the petitioners' substantive right under the Due Process Clause, and that the law lacked any legitimate purpose, its inquiry was at an end. Heightened scrutiny requires a compelling state interest. The *Lawrence* Court clearly found that there

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[50] As indicated by Justice Souter in *Glucksberg,* this heightened protection applies regardless of whether the protected right is expressly labeled as "fundamental." 521 U.S. at 768 n. 10 (Souter, J., concurring) ("Our cases have used various terms to refer to fundamental liberty interests," including "basic liberty," "constitutionally protected liberty interest," and "right") (internal citations and quotation marks omitted); *Casey,* 505 U.S. at 848 (requiring heightened scrutiny of burdens on right to abortion without labeling right as "fundamental").

was not even a conceivable legitimate state interest that could have sustained the Texas law.

The only way to avoid the conclusion that *Lawrence* recognized a fundamental right or liberty interest that requires heightened scrutiny is to deliberately refuse to give meaning to the overwhelming bulk of the words, phrases, sentences, and paragraphs used in *Lawrence.* Under the panel's view, *Lawrence* is a one-sentence opinion with pages and pages of irrelevant *dicta.*[51] I submit that it is the panel in *Lofton* that constructs a "strained and ultimately incorrect reading of *Lawrence.*"

C. Florida's Adoption Ban is Subject to Heightened Scrutiny Because It Significantly Burdens the Right Identified in *Lawrence.*

Every precedent teaches that when the government directly burdens a fundamental right or liberty interest of the nature affirmed in *Lawrence,* heightened scrutiny applies. *See, e.g., Roe,* 410 U.S. at 155; *Zablocki v. Redhail,* 434 U.S. 374, 387-88 (1978) (heightened scrutiny applies to direct and substantial burdens on due process right).[52] This heightened scrutiny requires that legislation be "narrowly drawn" to achieve a "compelling state interest." *Roe,* 410 U.S. at 155.[53]

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[51] *See also* Special Concurrence by Judge Birch to Denial of Rehearing *En Banc* at 1283-1284 (arguing that the *Lawrence* Court "disposes of the case in a single sentence").

[52] *See also McKinney v. Pate,* 20 F.3d 1550, 1556 (11th Cir.1994) (noting that when a "right merits substantive due process protection" it is protected against government actions regardless of the fairness of the procedures used).

[53] The only sexual privacy case where the Court did not use this language was *Casey,* where it analyzed civil burdens on a woman's right to abortion, not an outright criminal ban. The Court found that a state regulation that had "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" would

The panel argues essentially that, even if *Lawrence* affirmed a fundamental right or liberty interest, heightened scrutiny is not appropriate here, first, because adoption is a privilege and not a right under state law and, second, because Florida's ban is the product of a civil rather than a criminal law.[54]

With respect to the panel's first argument, the Supreme Court long ago rejected the rights/privileges distinction. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 627 n. 6, 638 (1969) (invalidating law that conditioned receipt of welfare benefits, a statutory privilege, on one-year residency requirement as an unconstitutional burden on right to interstate travel, and noting that "[t]his constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.' "), *overruled in part on other grounds by Edelman v. Jordan,* 415 U.S. 651 (1974).[55] Therefore, contrary to the panel's

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place an "undue burden" on the right to abortion and therefore be unconstitutional. *Casey,* 505 U.S. at 869.

[54] *Lofton,* 358 F.3d at 809 ("Appellants' challenge cannot be viewed apart from the context in which it arises. Under Florida law, adoption is not a right; it is a statutory privilege ... [A]doption law is unlike criminal law, for example, where the paramount substantive concern is not intruding on individuals' liberty interests.") (internal quotation marks and citation omitted).

[55] *See also Graham v. Richardson,* 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "); *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970) ("The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.' "); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) ("[C]onstruction of the statute [cannot] be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); and *Speiser v. Randall,* 357 U.S. 513, 518 (1958) ("[A]ppellees are plainly mistaken in their

suggestions, the refusal to extend a government benefit or privilege on non-discriminatory terms may indeed unconstitutionally burden the exercise of a fundamental right or liberty interest.

The panel's second argument is also mistaken. *See Lofton,* 358 F.3d at 817 (distinguishing *Lawrence* because "[t]he relevant state action [here] is not criminal prohibition, but grant of a statutory privilege"). The need to closely scrutinize Florida's justifications for burdening this right is not diminished because the burden in this case is the product of a civil statute, rather than a criminal law. Once a fundamental right or liberty interest has been established, the Supreme Court has stated that heightened scrutiny applies not only when a state punishes its exercise by means of a criminal statute, but also when a civil law directly and substantially burdens that protected right.

For example, the Court in *Zablocki* applied heightened scrutiny in striking down a civil law that prevented individuals who had not made child support payments from receiving a marriage license. 434 U.S. at 388-91. The Court found that the government was unable to show that the law was justified by "sufficiently important state interests" or that it was "closely tailored to effectuate only those interests." *Id.* at 388. The Court explained that heightened scrutiny was appropriate because the law had "directly and substantially" burdened the right of poor people to marry. *Id.* at 387.

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argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."). *See also Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); and *Jones v. State Bd. of Educ. for State of Tennessee,* 397 U.S. 31, 34 (1970) ("[I]t is far too late to suggest that since attendance at a state university is a 'privilege,' not a 'right,' there are no constitutional barriers to summary withdrawal of the 'privilege.' ").

Similarly, in *Shapiro,* the Court struck down the civil laws of various jurisdictions which required that residents live within the jurisdiction for a year before receiving welfare benefits. 394 U.S. at 622-23, 642. Even though the laws involved the receipt of a government benefit (welfare payments) rather than a right, the Court expressly rejected the application of rational-basis review. *Id.* at 627 n. 6 (noting that "*[t]his constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.*' ") (emphasis added). Instead, because the law "penalized" the fundamental right to interstate travel, the Court asked whether the law was "necessary" to achieve a "compelling governmental interest." *Id.* at 634.

Together, *Zablocki* and *Shapiro* stand for the proposition that a court must analyze a civil law under heightened scrutiny when it either penalizes or severely burdens the exercise of a fundamental right. I submit that if heightened scrutiny was required given the nature of the civil burdens in *Zablocki* and *Shapiro,* then such scrutiny must, a fortiori, apply in this case. After all, in *Zablocki,* a person could marry after making his or her delinquent child support payment. And in *Shapiro,* a resident would be eligible to receive welfare payments (a government benefit like the ability to adopt) after living in the relevant jurisdiction for a year. But a person exercising his or her *Lawrence* right in Florida may *never* adopt. The categorical nature of this ban, which burdens the right to form intimate relationships only when it is exercised by homosexuals, requires the same close analysis that the Court gave to the laws analyzed in *Zablocki* and *Shapiro* and warrants the very same result.[56] None of the

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[56] In *Zablocki* and *Shapiro,* the Court applied heightened scrutiny using an equal protection analysis. This made sense given that the government had burdened the right of poor people to marry (*Zablocki*), and had discriminated against new residents exercising their right to travel (*Shapiro*). Likewise, Florida's statute creates two classes of citizens: one

three cases newly cited by Judge Birch in his Special Concurrence in an attempt to fill the gaps in the panel opinion rebuts this conclusion.[57]

In sum, given the *Lawrence* Court's recognition of the fundamental nature of the liberty interest of consenting adults to engage in homosexual relationships, Florida's statute must be subjected to heightened scrutiny. The statute in this case imposes a direct, substantial and severe burden on the right recognized in *Lawrence.* Florida's adoption ban forces a choice between the right to participate in a consensual, private, intimate relationship and consideration for parenthood through adoption. In effect, under the Florida

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of whom (heterosexuals) is allowed to form intimate relationships without any penalties, while the other (homosexuals) must choose between being considered as an adoptive parent and the ability to enter or remain in an intimate relationship. Therefore, *Zablocki* and *Shapiro* demonstrate that Florida's law can be analyzed using heightened scrutiny under *either* the Equal Protection or Due Process clauses.

[57] *See* Special Concurrence by Judge Birch to Denial of Rehearing *En Banc* at 1288-1289, 1289 n. 22. These three cases--*Sell v. United States,* 539 U.S. 166 (2003); *City of Chicago v. Morales,* 527 U.S. 41 (1999); and *Youngberg v. Romeo,* 457 U.S. 307 (1982)--do not have any application to the issue before us. In *Morales,* a municipality passed an ordinance that allowed police officers to order individuals who were loitering on street corners to disperse if an officer reasonably believed that at least one of the individuals was a gang member. The Court invalidated the statute on vagueness grounds, finding that the ordinance "affords too much discretion to the police and too little notice to citizens who wish to use the public streets." *Morales,* 527 U.S. at 64. Thus, the Court never reached the issue of whether the city had violated a liberty interest in loitering, and so had no occasion to address the appropriate level of scrutiny for analyzing such a claim. The other two cases, *Youngberg* and *Sell,* involved individuals already in government custody, with very different implications for the liberty interests at stake. *See Youngberg,* 457 U.S. at 309 (involving a severely mentally retarded adult in a state mental institution); *Sell,* 539 U.S. at 171 (involving a prisoner opposed to forced anti-psychotic medication). Neither case says anything about the appropriate level of scrutiny for claims raised by autonomous, free adults making decisions about private sexual conduct.

statute, homosexual men and women must forgo the consideration given to all others to be adoptive parents in order to engage in conduct protected by the Fourteenth Amendment. The Constitution does not permit such a choice unless, under heightened scrutiny, a compelling and narrowly tailored justification has been found. As demonstrated above, not only is there no compelling interest to justify the Florida adoption ban, but the law is not even rationally related to the governmental purposes asserted. As such, Florida's ban on homosexual adoption fails both heightened scrutiny and rational basis review.

MARCUS, Circuit Judge, Dissenting from the Denial of Rehearing En Banc in which TJOFLAT and WILSON, Circuit Judges, join:

I believe there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted felons or drug addicts from adopting. There is undeniably an important question whether this statutory scheme meets a minimal standard of rational basis review. Accordingly, I dissent from the denial of rehearing *en banc*.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION
Case No. 99-10058-CIV-KING

STEVEN LOFTON; DOUGLAS E. HOUGHTON, JR.; JOHN DOE and JOHN ROE, minor children, by and through their next friend, TIMOTHY ARCARO; WAYNE LARUE SMITH and DANIEL SKAHEN,

Plaintiffs,

v.

KATHLEEN A. KEARNEY, Secretary of Florida's Department of Children and Families; and CHARLES AUSLANDER, District Administrator of District XI of Florida's Department of Children and Families,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendants' Motion for Final Summary Judgment filed July 2, 2001. Child Plaintiffs filed a Response to Defendants' Motion for Final Summary Judgment on July 17, 2001. Adult Plaintiffs filed a Response to Defendants' Motion for Final Summary Judgment on July 18, 2001. No reply has been filed and the time to do so has passed. The Court heard oral arguments on Defendants' Motion for Final Summary

Judgment and Plaintiffs' responses thereto on July 20, 2001. The issue before this Court is whether Florida Statute § 63.042(3)[1] ("homosexual adoption provision") which prohibits adoptions by homosexuals[2] impermissibly infringes on the Plaintiffs' federal constitutional right to privacy, intimate association and family integrity and violates the Due Process Clause as well as the Equal Protection Clause of the Constitution.

I. PARTIES

A. Plaintiffs

Plaintiff Steven Lofton ("Lofton") is a registered pediatric nurse and a certified long-term foster parent. He has raised three foster children, including child Plaintiff John Doe ("Doe"), since their infancy. All three of Lofton's foster children tested positive for HIV at birth. While the other two foster children developed AIDS, Doe successfully sero-converted during infancy and no longer tests positive for HIV. For the past ten years, Lofton has cared for his foster children full-time, administering their medications and looking after them when they were sick. For his efforts, he received the Outstanding Foster Parenting award from the Children's Home Society, a child placement agency licensed

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[1] In 1977, Florida became the first state to statutorily ban adoption by gay or lesbian adults by enacting the homosexual adoption provision. Currently, it is the only state with such a prohibition. The homosexual adoption provision provides in pertinent part:

> 63.042. Who may be adopted; who may adopt.
>
> * * * * * *
>
> (3) No person eligible to adopt under this statute may adopt if that person is a homosexual.

[2] Plaintiffs have not challenged the homosexual adoption provision on the grounds of vagueness or over breadth. *See generally Cox v. Florida Department of Health and Rehabilitative Services,* 656 So.2d 902 (Fla.1995)

by Florida's predecessor agency to the Department of Children and Families ("DCF"). When Doe was freed for adoption in May 19, 1994, Lofton submitted an application with DCF in September of 1994 to adopt him. However, under the homosexual adoption provision, Lofton was automatically disqualified from adopting because he is a gay man.[3]

Plaintiff Douglas E. Houghton, Jr., ("Houghton") is a clinical nurse specialist and legal guardian of child Plaintiff John Roe ("Roe").[4] Houghton has been Roe's caretaker

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[3] In their Motion for Final Summary Judgment, Defendants argue for the first time that Plaintiff Lofton does not have standing to bring forth this action because his adoption application was rejected due to his failure to complete it and not due to his sexuality. Defendants state that he failed to indicate his sexuality on the adoption application, thereby rending it incomplete. However, throughout this case, Defendants have conceded that Lofton's application had been rejected because he is a homosexual. The correspondences between Defendants and Lofton clearly indicate that Defendants were well aware of Lofton's sexuality. (*See* Dep. of Steven Lofton, Ex. 1 to Defs.' Concise Statement at 151.) Furthermore, Defendants answered the Amended Complaint by stating that Lofton's application was denied "in the course of enforcing Fla. Stat. sec 63.042(3)." (Answer to Am. Compl. at ¶ 11.) Defendants' claim that Lofton was rejected because his application was incomplete and not because he is a gay man is disingenuous in light of the explicit language of their Answer and evidence in the record. The Court notes that admissions in pleading are deemed judicial admission, binding on the party who makes them, *see Missouri Hous. Dev. Comm'n v. Brice,* 919 F.2d 1306, 1314 (8th Cir.1990), even if the party offers post-pleading evidence which contradicts the admission, *see Ferguson v. Neighborhood Hous. Servs. of Cleveland, Inc.,* 780 F.2d 549, 550-51 (6th Cir.1986).

[4] In their Motion for Final Summary Judgment, Defendants argue for the first time that Timothy Arcaro, who represents minor Plaintiff Roe as next friend, is not an appropriate representative for Roe, and that because Roe is not adequately represented, his claims should be dismissed. Defendants allege that Arcaro lacks a relationship to the child, knowledge of the child, and expertise in child development to advance a colorable claim as Roe's next friend. Although the Court does not automatically grant the right to act as next friend to whomever seeks to pursue an action on behalf of another, *see Gonzalez v. Reno,* 86

since Roe's biological father, suffering from alcohol abuse and inconsistent employment, voluntarily left him with Houghton when Roe was four-years old. A few years after becoming Roe's legal guardian, Houghton decided to adopt him pursuant to Roe's biological father's decision to terminate his parental rights. Because Roe is not in DCF custody, Houghton must file an adoption petition in the Circuit Court for the Eleventh Judicial Circuit of and for Miami Dade County. However, Florida law requires that before filing an adoption petition with a State circuit court, Houghton must first receive a favorable preliminary home study evaluation. *See* Fla. Stat. § 63.112(2)(b). During his May 19, 2000, preliminary home study interview, Houghton was informed that but for his homosexuality and the homosexual adoption provision he would have received a favorable preliminary home study evaluation.[5] Thus, Houghton is precluded from filing an adoption petition for Roe in the State circuit court.

Plaintiffs Wayne Larue Smith ("Smith") and Daniel Skahen[6] ("Skahen") became a licensed DCF family foster

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F.Supp.2d 1167, 1184 (S.D.Fla.2000), the Court finds that Arcaro satisfies the Eleventh Circuit's standard for determining next friend, *see Ford v. Haley*, 195 F.3d 603, 624 (11th Cir.1999). Specifically, child Plaintiff Roe is a real party in interest who because of his age is precluded from pursuing his own case and Arcaro, who has never put forth any monetary claim for damages on behalf of Roe that would suggest a self-serving motive, is sufficiently dedicated to his interests.

[5] The preliminary home study was conducted by Elizabeth Davies, MS, LMHC.

[6] Defendants argue for the first time in their Motion for Final Summary Judgment that Smith, Skahen, Houghton and Roe do not have standing to bring forth their actions because at the time of filing the initial Complaint, they had not suffered any actual injury in fact to grant them standing. However, Defendants stated during the hearing on Defendants' Motion for Final Summary Judgment that they have withdrawn this argument in light of the Supreme Court's ruling in *Mathews v. Diaz*, 426 U.S. 67 (1976) (citations omitted), which held that Rule 15 of the

home after successfully completing a requisite 10-week course in January of 2000. Since then, they have cared for three foster children but none who have been freed for adoption. On or about May 1, 2000, Smith and Skahen submitted at-large adoption applications[7] with DCF District XI to serve as adoptive parents. As required on the adoption application, both Smith and Skahen indicated that they are gay men. On May 15, 2000, they received written notices from DCF stating that their adoption applications had been denied on the basis that the homosexual adoption provision prohibits gay men from adopting.

B. Defendants

Defendants Kathleen A. Kearney ("Kearney") and Charles Auslander ("Auslander") have been sued in their official capacity as the individuals responsible for enforcing the homosexual adoption provision. Kearney is the Secretary of Florida's Department of Children and Families. She is responsible for the enforcement of the homosexual adoption provision in Florida. Auslander is the District Administrator of District XI of Florida's DCF. He is responsible for the enforcement of the homosexual adoption provision in Miami-Dade and Monroe Counties.

II. PROCEDURAL HISTORY

The above-styled action was initiated on May 26, 1999 by the above-named Plaintiffs, along with Brenda and Gregory Bradley and Angela Gilmore. Brenda and Gregory Bradley alleged that they intended to designate a homosexual relative to be the guardian and eventual adoptive parent of

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Federal Rules of Civil Procedure allows pleadings to be amended to add post filing facts in order to cure a jurisdiction defect. *See id.* at 75, 96 S.Ct. 1883.

[7] An at-large adoption application is not particular to any child. Currently, there are over 3,400 children in Florida awaiting adoption. (*See* Joint Pre-Trial Stipulation at 5.)

their children in the event of their deaths. Angela Gilmore alleged that she is a lesbian who desired to be an adoptive parent but was automatically disqualified under the homosexual adoption provision. In its April 21, 2000, Order Granting in Part Defendants' Motion to Dismiss, the Court concluded that all Plaintiffs except for Lofton and Doe failed to establish an injury in fact that is both real and immediate. *See Lofton v. Kearney,* 93 F.Supp.2d 1343, 1348 (S.D.Fla.2000). Except for Lofton, none of the adult Plaintiffs had actually applied to become adoptive parents for any child nor had been denied the opportunity to adopt. *See id.* at 1346. Thus, the Court dismissed without prejudice the claims of these Plaintiffs for lack of standing.

On May 22, 2000, Plaintiffs filed their First Amended Complaint ("Amended Complaint"). In the Amended Complaint, Houghton indicated that since the Court's original dismissal, he had a preliminary home study conducted but was denied a favorable home study evaluation because of his sexuality. In addition, Smith and Skahen indicated that they had submitted adoption applications but had been rejected on the basis of their sexuality. The Amended Complaint also re-alleged the claims made previously by the Bradleys without any change in facts.[8] In its October 24, 2000, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss First Amended Complaint, the Court declared that except for the Bradleys, Plaintiffs had established actual injury in fact sufficient to grant them standing to bring forth their claims. The Bradleys' claims were dismissed by the Court for the same reasons set forth in its April 21, 2000, Order. The Court declared that it would defer ruling on the merits of Plaintiffs' claims until summary judgment.

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[8] Angela Gilmore and her claims were omitted from the Amended Complaint.

Plaintiffs' Amended Complaint alleges that the homosexual adoption provision violates the fundamental rights of Lofton, Houghton, Doe and Roe to familial privacy, intimate association and family integrity protected by the First Amendment and the Due Process Clause of the 14th Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983. According to Plaintiffs Lofton, Doe, Houghton and Roe, the homosexual adoption provision prohibits them from obtaining permanency in their relationships which creates uncertainty about the future integrity of their families and imposes a significant burden on the intimate, highly personal relationships between them. In addition, all Plaintiffs allege that by only prohibiting lesbians and gay men from adopting children, the homosexual adoption provision violates their rights to equal protection guaranteed by the 14th Amendment to the United States Constitution. Defendants move for summary judgment on all of Plaintiffs' claims.

III. STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (citations omitted). The Court must view the evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986) (citations omitted).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant meets this burden, the burden then shifts to the nonmoving party to establish that a genuine dispute of material fact exists. *See Hairston v. Gainesville Sun Publ'g Co.,* 9 F.3d 913, 918 (11th Cir.1993). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the nonmoving party, then the Court should refuse

to grant summary judgment. *See id.* at 919. However, a mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment. *See Anderson,* 477 U.S. at 252. If the evidence is merely colorable or is not significantly probative, summary judgment is proper. *See id.* at 249-50.

IV. ANALYSIS

A. Fundamental Rights of Familial Privacy, Intimate Association and Family Integrity and the Due Process Clause

Fundamental rights are those that are objectively "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997) (citations omitted). In addition to those enumerated in the Bill of Rights, fundamental rights are implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *See id.,* citing *Palko v. Connecticut,* 302 U.S. 319, 325-26 (1937) (citations omitted). Plaintiffs Houghton, Roe, Lofton and Doe allege that the homosexual adoption provision violates their fundamental rights to family privacy,[9] intimate association and family integrity as embodied in their alleged Constitutional right to the care, custody, and control of Doe and Roe. (*See* Amen. Compl. ¶¶ 74, 86; Adult Pls.' Resp. to Sum. J., at 14-15.) Plaintiffs emphasize that the United States Supreme Court has declared "the interest of a parent in the care, custody, and control of their children [to be] perhaps the oldest of the fundamental liberty interests ...." *Troxel v. Granville,* 530 U.S. 57, 65 (2000) (citations omitted). Although this liberty interest has principally been granted to

[9] Plaintiffs do not assert a right of privacy to sexuality or sexual practice between adults.

blood relatives,[10] Plaintiffs assert that this right should be extended to foster family and legal guardian family units. According to Plaintiffs, the critical core of this liberty interest is the emotional bond that develops between family members as a result of shared daily life irrespective of the existence of a blood relationship. Furthermore, Plaintiffs assert that only by being allowed to adopt will they be able to protect their alleged rights.

As a threshold matter, the Court recognizes that a family can be established by more than mere biological ties. Family units are forged on the emotional attachments that derive from the intimacy of daily association as well as from blood relationships. The importance of a family to the individuals involved and to society is rooted in these emotional attachments. *See Smith v. Organization of Foster Families for Equality & Reform (OFFER),* 431 U.S. 816, 844 (1977) (citations omitted). These emotional bonds may exist irrespective of the absence of biological ties. *See id.* This is especially true when wards have been placed in the homes of their caretakers since infancy or childhood and have been raised continuously by them without having ever significantly known their biological parents. *See id.* The Court does not doubt that the emotional ties between Lofton and Doe and between Houghton and Roe are quite close--as close as those between biological parents. Nor does the Court doubt that a deeply loving and interdependent relationship between Lofton and Doe and between Houghton and Roe exists. Therefore, there is no need for a trial, as Plaintiffs suggest, to show that intimate, highly personal parent-child relationships between Lofton and Doe and between Hougton and Roe have been forged.

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[10] *See e.g., Michael H. v. Gerald D.,* 491 U.S. 110 (1989) (citations omitted); *Lehr v. Robertson,* 463 U.S. 248 (1983) (citations omitted); *Caban v. Mohammed,* 441 U.S. 380 (1979) (citations omitted); *Quilloin v. Walcott,* 434 U.S. 246 (1978) (citations omitted); *Stanley v. Illinois,* 405 U.S. 645 (1972) (citations omitted).

However, the existence of strong emotional bonds between Plaintiffs does not inherently grant them a fundamental right to family privacy, intimate association and family integrity. The Court finds *Smith v. OFFER* to be instructive. In *Smith,* the United States Supreme Court reviewed the constitutionality of procedures by which New York State removed foster children from foster homes. In doing so, the Court considered whether the relationship between foster parent to foster child was sufficiently akin to the concept of family to warrant constitutional protection. While the *Smith* Court acknowledged that a parent-child relationship between an unrelated adult and child might exist and might enjoy due process guarantees, the Supreme Court stopped short of identifying the foster parent-child relationship as one such relationship. *See id.* at 844. The *Smith* Court stated that unlike natural families, foster parents do not have a justifiable expectations of an enduring companionship because the emotional ties originate under state law. *See id.*

It is this justified expectation of enduring companionship that has become the benchmark for protected liberty interest in the family. Although the concept of family embraces relationships other than the archetypical nuclear family, the Constitution protects only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family. *See Wooley v. City of Baton Rouge,* 211 F.3d 913, 921 (5th Cir.2000), citing *Smith,* 431 U.S. at 816, 97 S.Ct. 2094; *see also Drummond v. Fulton County Dept. of Family & Children's Services,* 563 F.2d 1200 (5th Cir.1977) (finding no liberty interest in a foster parent-child relationship that existed for more than two years). A biological connection between those asserting this

type of protection generally satisfies this standard.[11] *See Stanley v. Illinois,* 405 U.S. 645 (1972) (finding that a liberty interest existed in a relationship between biological father and son that the state can neither supply nor hinder); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977) (holding that biological relatives draw together and participate in the duties and satisfactions of a common home); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (declaring that a biological relationship between parent and child brought the relationship within the ambit of the Fourteenth Amendment).

Here, the Court finds that Lofton's foster family relationship and Houghton's legal guardian relationship do not warrant justified expectations of family unit permanency. Foster families are grounded in state law and contractual arrangements. *See Smith,* 431 U.S. at 845. Furthermore, foster care is typically a short-term placement while the State seeks to find permanent placement in an adoptive home. Lofton entered into his foster care relationship with Doe implicitly aware of this given that he entered into his foster care relationship with Doe at the approval of the State. Similarly, Houghton entered into his legal guardian relationship with Roe with the implicit knowledge that it was not necessarily a permanent arrangement but one subject to the approval of the Florida state courts. In both cases, the State does not involve itself with natural family units that exist independent of its power, but ones directly created by it. The emotional connections between Lofton and Doe and between Houghton and Roe originate in arrangements in which DCF and the State have been partners from the outset. *See Smith,* 431 U.S. at 845. Plaintiffs Lofton and Houghton entered into relationships to be a foster parent and legal

[11] The Court notes that even a biological relationship between parent and child does not necessarily establish a protected liberty interest. *See Lehr v. Robertson,* 463 U.S. 248 (1983) (citations omitted); *Quilloin v. Walcott,* 434 U.S. 246 (1978) (citations omitted); *Wooley v. City of Baton Rouge,* 211 F.3d 913 (5th Cir.2000).

guardian, respectively, with an inherent understanding that the relationships they forged would not be immune from DCF and State oversight but permitted only upon their approval. Thus, while this Court recognizes the need, importance, and value of foster parent and legal guardian relationships, it cannot extend to those relationships the liberty interest granted to biological parents in the care, custody, and control of their children. Lofton, Doe, Houghton and Roe have no expectation of permanency and, therefore, no right to exclude the State from their family lives.

The Court cannot accept Plaintiffs' claim that the only means by which they can protect these alleged rights is to allow them to adopt. It is undisputed that there is no fundamental right to adopt, (*see* Joint Pre-Trial Stipulation at 10), nor is there a fundamental right to be adopted, (*see id.*).[12] Instead, adoption is a privilege created by statute and not by common law. *See id.; see also, In re Palmer's Adoption,* 129 Fla. 630, 176 So. 537 (1937); *Kyees v. County Department of Public Welfare of Tippecanoe County,* 600 F.2d 693 (7th Cir.1979). It follows that given that there is no fundamental right to adopt or to be adopted, there can be no fundamental right to apply for adoption. The Supreme Court has warned against expanding fundamental rights because once a fundamental right is identified, the matter is placed "outside the arena of public debate and legislative action." *Glucksberg,* 521 U.S. at 720-21. It is not for the courts to transform the liberties protected by the Due Process Clause into the public policy preferences of the Court. *Id.*

B. Equal Protection Clause

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[12] Plaintiffs do not dispute that there is no privacy right to adopt a child, *see Lindley v. Sullivan,* 889 F.2d 124, 131 (7th Cir.1989), nor a fundamental liberty interest in adopting a child, *see Mullins v. State of Oregon,* 57 F.3d 789 (9th Cir.1995).

The Equal Protection Clause of the Fourteenth Amendment to the Constitution proclaims that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of laws." U.S. CONST. amend. XIV, § 1. However, classifications are not necessarily forbidden by the Equal Protection Clause. *See Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992) (citations omitted). Instead, governmental decision makers are prohibited from treating differently individuals who are alike in all relevant respects. *See id.; Panama City Medical Diagnostic Ltd. v. Williams,* 13 F.3d 1541 (11th Cir.1994). When legislation or government policy discriminates between classes or deprives a group of a particular right, the level of scrutiny applied under an equal protection challenge turns on the nature of the group allegedly discriminated against. *See City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) (citations omitted). As a general rule, the governmental action in question will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest. *See id.* Under this rational basis test, the statute is granted a strong presumption that it is reasonably related to a legitimate government interest, and, therefore, valid under equal protection analysis. *See id.; Lyng v. International Union,* 485 U.S. 360, 370 (1988) (citations omitted). Where a statute targets a quasi-suspect class, namely those based upon gender or illegitimacy, a heightened level of scrutiny applies. *See id.* at 441. Under this intermediate scrutiny test, the statute is presumed invalid unless it is substantially related to a sufficiently important governmental interest. *See id.* Where a statute targets a suspect class, including race, alienage, or national origin or burdens a fundamental right, the statute in question will only be sustained if it is narrowly tailored to serve a compelling state interest. *See id.* at 440.

Plaintiffs assert that the homosexual adoption provision should be analyzed under the most exacting of equal protection scrutiny, or, at the least, under the

intermediate scrutiny test. According to Plaintiffs, homosexuals warrant protection as a suspect class because the homosexual adoption provision violates their fundamental rights. Furthermore, they assert that any classification which disadvantages lesbians and gay men is inherently suspect. This Court has already determined that foster parents and legal guardians do not possess any fundamental right to familial privacy, intimate association and family integrity. Nor is there any fundamental right to adopt, be adopted, or apply for adoption. Thus, the homosexual adoption provision does not tread upon any of Plaintiffs' asserted fundamental rights.

The more difficult question for this Court is whether homosexuals constitute a suspect or quasi-suspect class for the purpose of equal protection analysis. In *Romer v. Evans,* 517 U.S. 620 (1996), the Supreme Court suggested that they do not. The *Romer* Court invalidated an amendment to the Colorado state constitution which prohibited all governmental action designed to protect homosexuals from discrimination. In doing so, the *Romer* Court applied the rational basis test in analyzing the equal protection challenge to the state constitutional amendment.[13] Justice Scalia noted in his dissent that the *Romer* Court determined "rational basis--the normal test for compliance with the Equal Protection Clause--[to be] the governing standard" in such cases. *Id.* at 620 n. 1 (Scalia, J., dissenting).

Although the Eleventh Circuit has yet to weigh in on this particular issue, several other circuits which have examined whether homosexuals should be granted this heightened level of scrutiny and have declined to do so. These circuits have clearly declared that while homosexuals are protected by the Equal Protection Clause, government action classifying individuals on the basis of homosexuality

[13] In that case, the trial court had rejected the argument that homosexuals constitute a suspect or quasi-suspect class.

or homosexual conduct must be analyzed under the rational basis test.[14] This Court is unaware of and Plaintiffs have failed to cite any cases where a heightened level of scrutiny has been applied in determining the constitutionality of classifications targeting homosexuals.[15] Thus, in light of *Romer* and the abundance of case law on point, this Court shall evaluate Plaintiffs' equal protection challenge to the homosexual adoption provision under the rational basis test.[16] Accordingly, the homosexual adoption provision shall be granted the presumption that it is rationally related to a legitimate state interest and the burden shall be on Plaintiffs to negate every conceivable basis which might support it. *See F.C.C v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (citations omitted).

Defendants argue that the homosexual adoption provision serves two legitimate purposes. The first is that it reflects the State's moral disapproval of homosexuality consistent with the legislatures right to legislate public morality. According to Defendants, homosexuality has been long disfavored in the law based on beliefs firmly rooted in

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[14] *See e.g. Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.1996); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir.1984); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289 (6th Cir.1997); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir.1996); *Holmes v. California Army National Guard*, 124 F.3d 1126 (9th Cir.1997); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir.1984); *Steffan v. Perry*, 41 F.3d 677 (D.C.Cir.1994); *Woodward v. U.S.*, 871 F.2d 1068 (Fed.Cir.1989).

[15] Although a panel of judges from the Ninth Circuit Court of Appeals in *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir.1988), held that homosexuals were a suspect class, that opinion was withdrawn upon review by the full court, *see Watkins v. United States Army*, 875 F.2d 699 (1989). The full court eventually resolved the issues without reaching the equal protection challenge. *See id.*

[16] Plaintiffs have offered no evidence in their response to Defendants' Motion for Final Summary Judgment that raises a material issue of fact as to whether homosexuals are entitled to a higher level of scrutiny.

Judeo-Christian moral and ethical standards for a millennia. (*See* Defs.' Mot. Sum. J. at 17.) Defendants assert that the legislature is obligated to require adoptive parents to educate children regarding their religious heritage and promote this cultural and moral heritage by actively practicing it. (*See id.*) However, this Court finds that public morality alone is insufficient to justify the homosexual adoption provision. Enacting a classification to express society's disapproval of a group burdened by the law is precisely what the Equal Protection Clause does not allow. *See Romer,* 517 U.S. at 633. That is not to say that the government cannot legislate to achieve things which it believes is morally good, *see Berman v. Parker,* 348 U.S. 26, 32-33 (1954) (citations omitted); it is to say that the government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them. Thus, the Court cannot accept that moral disapproval of homosexuals or homosexuality serves a legitimate state interest.

The second interest asserted by Defendants is that the homosexual adoption provision serves the best interest of Florida's children. According to Defendants, a child's best interest is to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father. DCF regulations state that families in which there is a mother and a father are considered important for the well-rounded growth and development of the child. *See* F.A.C. 65C-16.005(6)(f)(1). Primary consideration is given to couples who have been married a sufficient length of time to establish stability so that even couples married less than two years are scrutinized particularly carefully. *See id.* Moreover, heterosexual unmarried couples living together in a sexually-cohabitating relationship will not be considered by DCF as joint adoptive parents. *See id.* According to Defendants, married heterosexual family units provide adopted children with proper gender role modeling and minimize social stigmatization.

Plaintiffs concede that categorically barring homosexuals from adoption in the best interest of Florida's children is on its face a legitimate purpose. (*See* Pls.' Resp. Mot. Sum. J. at 5). However, they suggest that this stated interest is merely a pretext for discrimination against homosexuals. (*See id.* at 5 n. 3). Plaintiffs wish to prove at trial that animus towards homosexuals underlie the State's true purpose in preventing homosexuals from adopting. However, as a matter of law, it is unnecessary and improper for this Court to determine whether the conceived reason for the challenged distinction actually motivated the legislature. *See Beach Communications, Inc.*, 508 U.S. at 315; *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir.1995); *Panama City Medical Diagnostic Ltd.*, 13 F.3d at 1547. It is enough for the legislation to be supported by plausible or hypothesized reasons. *See U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (citations omitted). Whether this reasoning in fact underlay the legislative decision is irrelevant. *See id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

Plaintiffs did not object to nor disagree with Defendants' statements that married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes in their memorandum or during oral arguments. Plaintiffs have not asserted that they can demonstrate that homosexual families are equivalently stable, are able to provide proper gender identification, or are no more socially stigmatizing than married heterosexual families. It is Plaintiffs' burden as the one attacking the homosexual adoption provision to negate every conceivable basis which might support it. Plaintiffs have chosen not to do so[17] and, thus, have left unchallenged Defendants' assertion

[17] Plaintiffs stated during the hearing on Defendants' Motion for Final Summary Judgment that they do not see the need to get into an expert discussion on these issues because even granting Defendants these facts,

that the best interest of the child is to be raised by a married family.

It is unnecessary for this Court to evaluate whether Defendants' statements are correct. Under the rational basis test, the government has no obligation to produce evidence to sustain the rationality of a statutory classification. *See Panama City Medical Diagnostic Ltd.*, 13 F.3d at 1547 (quoting *Beach Communications, Inc.*) Even if the assumptions underlying the rationales are erroneous, "the very fact that they are 'arguable' is sufficient, on rational basis review, to 'immuniz[e]' the congressional choice from constitutional challenge." *Beach Communications, Inc.*, 508 U .S. at 320. At the least, it is "arguable" that placing children in married homes is in the best interest of Florida's children for the reasons stated by Defendants. Thus, because Plaintiffs have neither satisfied their burden of negating the reasons offered by Defendants to justify the homosexual adoption provision nor raised material issues of fact with respect to Defendants' asserted legitimate interest and the fact that the homosexual adoption provision is granted the presumption of constitutionality, the Court must find Defendants' purported legitimate interest in excluding homosexuals from adopting—namely, placing adopted children in married homes—to be valid.

Instead of challenging the rationality of the homosexual adoption provision, Plaintiffs argue that Defendants have not satisfied *City of Cleburne*'s threshold requirement that they demonstrate that homosexuals pose a unique threat to children that others similarly situated in relevant respects such as single parents[18] do not. However,

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Defendants still have not justified their classification under *City of Cleburne*.

[18] Plaintiffs also point to the fact that substance abusers and perpetrators of domestic violence in addition to single parents are not categorically excluded from adopting under Florida law.

the Court finds Plaintiffs' reading of *City of Cleburne* to be an unwarranted interpretation of it. In *City of Cleburne,* the Supreme Court found under the rational basis test a municipal zoning ordinance requiring a group home for the mentally retarded to obtain a special use permit and the denial of the home's subsequent application for the permit to be unconstitutional. 473 U.S. at 432 (1985) (citations omitted). The municipality argued that it had a legitimate interest in (1) protecting the residents of the home from a nearby flood plain, (2) limiting potential liability for acts of residents of the home, (3) maintaining low density land uses in the neighborhood, (4) reducing congestion in neighborhood streets and (5) avoiding fire hazards. However, the Supreme Court declared that the municipality failed to distinguish how these concerns applied particularly to mentally retarded residents of the home and not to a number of persons who could freely occupy the identical structure without a permit, such as boarding houses, fraternity houses, and nursing homes. *See id.* at 450. It concluded that the municipality's purported justifications for the ordinance made no sense in light of how it treated other groups similarly situated in all relevant respects. *See Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001) (citations omitted) (interpreting the holding of *City of Cleburne*). As a result, the Supreme Court was left to declare that the law "rest[ed] on an irrational prejudice against the mentally retarded ...." *City of Cleburne,* 473 U.S. at 450.

Plaintiffs have overstated the Supreme Court's holding in *City of Cleburne* by asserting that the ruling places a burden on Defendants to show that homosexuals pose a greater threat than other nonmarried adults who are allowed to adopt. The Supreme Court in *City of Cleburne* merely reasserted that under the rational basis test a statute which discriminates against a particular group must be rationally related to the asserted legitimate purpose. In *City*

of Cleburne, the Supreme Court found that it was not. In particular, it found that the targeted group was similarly situated as other groups. The case at hand is distinguishable from *City of Cleburne.* Homosexuals are not similar in all relevant aspects to other nonmarried adults with respect to Defendants' purported best interest of the child. Nonmarried adults, unlike homosexuals, can get married. On the other hand, homosexuals cannot marry or be recognized as a marital unit[19] and, thus, cannot meet this State's asserted interest underlying the homosexual adoption provision.

The Court notes that the Equal Protection Clause of the Fourteenth Amendment is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. *See Beach Communications, Inc.,* 508 U.S. at 313. "In areas of social ... policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.; see also, Sullivan v. Stroop,* 496 U.S. 478, 485 (1990) (citations omitted); *Bowen v. Gilliard,* 483 U.S. 587, 600-03 (1987); *Dandridge v. Williams,* 397 U.S. 471, 484-85 (1970). Where there is a plausible reason for the State's action, this Court's inquiry must end. *See id.*

V. CONCLUSION

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is ORDERED and ADJUDGED that Defendants' Motion for Final Summary Judgment be, and the same is hereby, GRANTED.

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[19] The Federal and Florida's Defense of Marriage Act precludes homosexuals who marry in other states from being recognized by Florida as a legal union. *See* 1 U.S.C. § 7 (West 1997); Fla. Stat. § 741.212 (1997).

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 99-10058-CIV-KING
Magistrate Judge O'Sullivan

STEVEN LOFTON, et al,

Plaintiffs,

-v-

KATHLEEN A. KEARNEY, et al.

Defendants.

ADULT PLAINTIFFS' CONCISE STATEMENT OF MATERIAL FACTS

Pursuant to S.D. Fla. L.R. 7.5, the adult plaintiffs submit this concise statement of material facts in opposition to defendants' Motion for Summary Judgment.

A. Preliminary Note

Few of the "facts" in Defendants' Concise Statement are material to (or even mentioned in) any of the arguments they have made on this motion. Instead of addressing all of the allegations that do not relate to the motion (most of which seem to be focused on the character of some of the adult plaintiffs) the adult plaintiffs will first describe those material facts as to which they believe there is an issue to be tried. Then, the adult plaintiffs will add a few notes about some of the claims made about some of them, even though they are not material to this motion.

B. Facts Material to the Equal Protection Claim

These facts are material to plaintiffs' claim that defendants have failed to provide any explanation for preventing lesbians and gay men from being evaluated for individual suitability to adopt, while permitting other groups, whose threat to the best interests of children is well known, to be evaluated on a case by case basis.

1. Department of Children and Family ("DCF") high-ranking child welfare officials agree that parental substance abuse and violence pose serious dangers to children. Deposition of John Perdue Perry, III, Ex. A to Second Cooper Decl. ("Perry Dep."), at 124-129; Deposition of Linda Radigan, Ex. A to Third Cooper Decl. ("Radigan Dep."), at 137-139, 146-148.

2. Parental substance abuse and violence play a role in over half of the cases in which children are removed from their families. Radigan Dep., Ex. A to Third Cooper Decl., at 139-142. A 1995 statewide review reported that for 57% of children in foster care, parental substance abuse was a factor in removal. Radigan Dep., Ex. A to Third Cooper Decl., at 139-142.

3. Individuals who have substance-abuse problems, including drug and alcohol abuse, are not categorically excluded from adopting children in Florida. Joint Pretrial Stipulation ("Joint Pretrial Stip.") at 4, ¶ 1. Individuals who engage in acts of domestic violence (except for those convicted of certain crimes of domestic violence), are not categorically excluded from adopting children in Florida under any state law or regulation. Joint Pretrial Stip. at 4, ¶3.

4. DCF is not aware of any children who are in the Florida foster-care system because of harm associated with the lesbian or gay orientation of their parents or care givers. Joint Pretrial Stip. at 4, ¶ 5.

5. Lesbians and gay men have been licensed by DCF to be foster parents in Florida, and children have been placed by DCF in long-term foster care with lesbian and gay foster parents. Joint Pretrial Stip. at 4, ¶¶ 7,8.

6. DCF has placed children in the guardianship of lesbians and gay men, ceasing DCF supervision. Joint Pretrial Stip. at 5, ¶11.

7. High-ranking DCF child welfare officials are unaware of any harms to children associated with having lesbian or gay parents. Perry Dep., Ex. A to Second Cooper Decl., at 111-112, 123.

8. High-ranking DCF child welfare officials can identify no child welfare basis for excluding lesbians and gay men from adopting. Perry Dep., Ex. A to Second Cooper Decl., at 147-148,

9. There is no statute or regulation that prohibits single heterosexuals from being considered as adoptive parents. Joint Pretrial Stip. at 6, ¶ 23.

10. In Florida, 25% of adoptions of children out of foster care are to single parents. In District XI, it climbs to 40.4%. Joint Pretrial Stip. at.6, ¶¶ 24, 25.

11. There are over 3400 children awaiting adoption. Joint Pretrial Stip. at 5, ¶ 15.

12. 36% of children in DCF custody statewide were in foster care for more than four years prior to having a

finalized adoption; and almost 80% of children waited more than two years. Joint Pretrial Stip. at 5, ¶ 16.

13. The sponsor of the bill that became the law challenged in this case, Sen. Peterson, stated that the purpose of the bill was to a message to lesbians and gay men that "we're really tired of you. We wished you'd go back into the closet." "Gay Bills Pass Both Chambers," First Cooper Decl., Ex. E.

C. Facts material to Mr. Lofton's standing to make his equal protection claim.

These facts are material to plaintiffs' argument that the question of whether Mr. Lofton was not permitted to adopt because he is gay is no longer an issue in the case, but would be disputed if it were.

14. DCF knew Mr. Lofton was gay. Lofton testified that by 1994, his relationship with Croteau was obvious to the Department. Deposition of Steven Lofton, Ex. 1 to Defendants' Concise Statement ("Lofton Dep."), at 151. Moreover, "[s]ome DCF caseworkers, supervisors and the District Administrator for District XI favored adoption of Doe by Lofton, knowing that he is gay. " Joint Pretrial Stip. at 7, ¶ 34.

15. Lofton told DCF that he was concerned that if he answered the question about his sexual orientation, his children would be taken away, but that "[i]n any event, he will answer the question should it be rejected for non-cooperation for not responding." Letter from William E. Adams, Jr., First Cooper Decl., Ex. A.

15A The state considered Mr. Lofton to be an active applicant for adoption after June, 1995. Citizen Review Report, First Cooper Decl., Ex B.

16. DCF admitted in its Answer to plaintiffs' First Amended Complaint that "in the course of enforcing Fla. Stats. § 63.042(3), DCF has declined to extend the adoption privilege to Lofton." Answer, ¶ 11. Section 63.042(3) says that otherwise eligible lesbians and gay men may not adopt, and nothing more.

D. Facts material to the due process claims.

These facts are material to plaintiffs' argument that the state has threatened Mr. Lofton's relationship with his son.

17. Doe was placed in foster care with Lofton when he was two months old, and Lofton and Doe have lived together for the past ten years. Joint pretrial Stip. at 7, ¶ 31.

18. Houghton became the legal guardian of John Roe in 1996 when the child was four years old, and they have lived together as parent and child ever since. Joint Pretrial Stip. at 6, ¶ 27.

19. On the morning of June 22, 2001, Lofton received a telephone call from DCF caseworker Andrea Owes, who informed him that because Lofton was unable to adopt his son, she would recruit a family to adopt his son instead. She then asked if he knew of others who might adopt his son. Memo from Andrea Owes to Ada Gonzalez, First Cooper Decl., Ex. D.

20. In response, Lofton's attorney wrote a letter to DCF counsel advising him of the call from Owes and asking for assurance that Doe would not be removed from his family pending the outcome of this litigation. Letter from Leslie Cooper to Casey Walker, First Cooper Decl., Ex. F.

21. DCF's counsel responded by saying the state would not promise to remove Doe from Lofton's home while this case is pending. The attorney added that he was authorized to represent that the Department did not intend to remove the child before it located a suitable adoptive home. Letter from Casey Walker to Leslie Cooper, First Cooper Decl., Ex G.

E. Facts material to standing to make the due process claims.

These facts are material to plaintiffs' argument that guardianship is not functionally equal to adoption and would not be in John Doe's best interest.

22. Had Steve Lofton become guardian of John Doe, John Doe would have ceased to receive Medicaid. Deposition of Timothy Arcaro, Ex. 12 to Defendants' Concise Statement ("Arcaro Dep."), at 87; DCF E-mails, Cooper Dec., Ex. C.

23. DCF and Lofton agreed it would not be in John Doe's best interests for Lofton to become his guardian and deprive him of Medicaid. Arcaro Dep. at 87.

24. John Doe may have significant need for medical care in the future. Lofton Dep. at 38-40.

25. Mr. Lofton was required by his agreement with DCF to provide full-time nursing care to those of his children who have AIDS, and he therefore could not work outside the home. Joint Pretrial Stip. at 6, ¶ 30.

F. Statement of additional facts about some of the adult plaintiffs.

Many allegations are made in defendant's concise statement of facts about the adult plaintiffs which are just not accurate, and in most cases are not even a fair reflection of the evidence invoked in support of them. For example, defendants say Steve Lofton was not interested in adopting John Doe until it was clear he did not have HIV, Memorandum at 22, when Mr. Lofton made it perfectly clear that was because until then, he thought there was no danger he would ever be taken away from him. Lofton Dep. at 36-38. Because these allegations are not material to the motion, and because of the short time for responding to this motion,[1] plaintiffs have not responded to most of these allegations. The Court will be able to judge for itself what kind of people Steve Lofton and Doug Houghton are when it hears them at trial.

But as counsel for all the adult plaintiffs, we must protest the shabby way the state of Florida has treated Steven Lofton on this motion. The state has done its level best to portray Mr. Lofton as a small, greedy man who takes in children for the money he can make off them. *See* Defendants' Concise Statement, at 2, 5. But this is hardly what the limited record before the Court now suggests. A single example will demonstrate. Defendants say Mr. Lofton was offered the "compromise" of becoming Doe's legal guardian. They say Mr. Lofton "refused" the offer and explain:

The reason for Mr. Lofton's refusal of the guardianship option was money: becoming Doe's guardian would cost Mr. Lofton $300.00/month in lost foster care benefits.

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[1] Plaintiffs did not receive a copy of the Motion for Summary Judgment until July 6, 2001.

As proof, defendants offer Exhibit 10, Exhibit 11, and Steve Lofton's deposition at p. 48. Defendants' Concise Statement, at 5.

Exhibit 10 is a statement by an lawyer in the attorney general's office that some unnamed person on some unspecified date "represented" to her that Steve Lofton would not (not even "said" he would not) become a guardian because he would lose income. Forget the rule against hearsay, which the declaration obviously violates (F.R.E. 801); this is nothing more than gossip.

The crucial statement in Exhibit 11 is not about guardianship per se, but about the "board rate." The statement is attributed to Mr. Arcaro, who was also John Doe's court appointed guardian. The first page of the document, which the state neglected to produce, adds a crucial piece of information. If Mr. Lofton became a guardian, he would lose John Doe's Medicaid coverage. *See* DCF E-mails, First Cooper Decl., Ex C. Steve Lofton is not employed outside the home, so he has no health insurance.[2] John Doe can't be covered on Mr. Croteau's insurance (Mr. Lofton and Mr. Croteau are not married). So if Mr. Lofton became a guardian, he would lose any coverage for John, who may have very significant health care needs in the future. DCF E-mails. First Cooper Decl., Ex C.

The cited part of Mr. Lofton's deposition says nothing about losing benefits were Mr. Lofton to become a guardian.

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[2] Although Defendants made a snide reference to the fact that Mr. Lofton does not work outside the home--"Mr. Lofton has not worked since taking foster children into his home in 1988.," Defs' Concise Stmnt, at 2–they have stipulated that because of the extraordinary needs of the children he cares for, the state would not allow him to have a separate job. Joint Pretrial Statement, "Concise Statement of Undisputed Facts," ¶ 30.

Instead, Mr. Lofton there explains why his partner, Mr. Croteau, contributes to the cost of raising John Doe (because the board rate of $300 a month doesn't pay the whole cost). Lofton Dep. at 46-50. It is clear from Mr. Lofton's testimony that he did not understand guardianship very well. *See* Lofton Dep. at 41-45, 162-163. It is very clear that his concern was not that his profit margin would be decreased if he made the wrong move, but that the extraordinary needs of his children would not be met. If all that were not enough, Timothy Arcaro testified that he and counsel for the Department agreed that given the removal of Medicaid funding, a guardianship would not be in John Doe's best interest. Arcaro Dep., Ex. 12 to Defendants' Concise Statement, p. 86-87. It was also clear from Mr. Lofton's deposition–and it will become crystal clear when Mr. Lofton appears at trial-- that he loves his son and all his children very much.

The state may disagree with this case. But that is no reason to paint as cold and calculating a man who has given something beyond any measure of money—a warm loving home—to these children in distress. Florida is lucky to have Steve Lofton as a parent. To attack him personally is disgraceful. The state of Florida should be ashamed.

To provide just a bit of balancing perspective, the adult plaintiffs offer first the following facts, none of which they understand to be disputed at this point: [3]

Steven Lofton has been a foster parent licensed by the State of Florida since 1988. Joint Pretrial Stip. at 6, ¶29. He is a pediatric nurse with experience in pediatric AIDS care. Lofton Dep. at 17. Since 1988, he has provided foster

[3] Even though plaintiffs understand none of this to be disputed, they have provided evidentiary support for virtually all of the facts set forth here.

care for 8 children who were HIV positive and/or had AIDS. Lofton Dep. at 13-27. Because of the children's medical condition, as part of his agreement with DCF, Lofton was required to provide them with full-time care and therefore could not work outside of the home. Joint Pretrial Stip. at 6, ¶ 30. Since Lofton first began fostering, his partner of 17 years, Roger Croteau, has been a part of building the family, providing both daily care for the children and financial help. Lofton Dep. at 48, 52.

The Children's Home Society, the agency that placed the children with Lofton, created an award in 1988 to honor the best foster parent of the year. They named the award the Lofton/Croteau award, and Lofton and Croteau were the first recipients. Compl. at ¶ 10.

Some of the children were placed in Lofton's care temporarily. Lofton Dep. at 13-27. But four children, who were placed with him as infants, remained in his care long-term. One child, Ginger, died of AIDS related illnesses at age six in 1994. Lofton Dep. at 23. Two of them, Franke and Tracey, are now 13. And John Doe is ten. All three live together, along with two Oregon foster children with Lofton and Croteau in Oregon. Joint Pretrial Stip. at 6, ¶ 29.

John Doe was born on April 29, 1991, and tested HIV positive, with both cocaine and marijuana in his system. Just over two months later, the Department placed Doe in foster care with Steve Lofton. Joint Pretrial Stip. at 7, ¶ 31. Doe later tested negative for HIV, and he remains HIV negative. Lofton Dep. at 45.

Lofton was open about his sexual orientation. Lofton Dep. at 61-62. His relationship with Croteau was obvious to DCF from before 1994. Lofton Dep. at 62-63. Some DCF caseworkers, supervisors and the District Administrator for

District XI favored adoption of Doe by Lofton, knowing that he is gay. Joint Pretrial Stip. at 7, ¶ 34.

Lofton and Doe have been together for ten years. They have significant emotional ties. Joint Pretrial Stip. at 7, ¶ 36. Lofton, Croteau and the other children in Lofton's care are Doe's family. This is the only family Doe has ever known.

Dated: July 17, 2001

s/Matthew Coles/Leslie Cooper/RCM by permission
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile transmission and by overnight delivery this 18th day of July, 2001, to CASEY WALKER, Esq., Moss Henderson Blaton & Lanier, P.A., 817 Beachland Blvd., P.O. Box 346, Vero Beach, Florida, 32964-3406, and by first class mail to CHRISTINA A. ZAWISZA, Children First Project, Nova Southeastern University, Shepard Broad Law Center, 3305 College Ave., Ste. 325, Ft. Lauderdale, Florida 33314-7721.

s/Randall C. Marshall
RANDALL C. MARSHALL

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 99-10058-CIV-KING
Magistrate Judge O'Sullivan

STEVEN LOFTON, et al.,	)
	)
Plaintiffs,	)
	)
-v-	)
	)
KATHLEEN A. KEARNEY, et al.,	)
	)
Defendants.	)
	)

JOINT PRETRIAL STIPULATION

The parties, plaintiffs Steven Lofton, et al., and defendants, and defendants, Kearney, et al., pursuant to this Court's pretrial order dated December 12, 2000 and Local Rule 16.1E, stipulate as follows:

I. Short Concise Statement of the Case

a. Plaintiffs' Statement.

At issue in this case is whether section 63.042(3), Fla. Stats., which singles out lesbians and gay men and no one else for automatic disqualification from adopting children, violates the equal protection clause of the 14th Amendment to the United States Constitution. The legislature's decision to exclude lesbians and gay men, about whom there is no evidence of parental unsuitability, while ignoring groups of people long known to pose serious risks of physical and

emotional harm to children– e.g. substance abusing and violent parents– has no explanation except bias.

Also at issue is whether the statute violates plaintiffs Lofton, Doe, Houghton and Roe's right to intimate association, privacy and family integrity guaranteed by the 1st and 14th Amendments to the United States Constitution. Lofton and Doe, and Houghton and Roe have intimate, highly personal parent-child relationships. By prohibiting these plaintiffs from securing their family relationships through adoption, and instead, creating uncertainty about the future integrity of their families, the statute imposes a significant burden on those relationships, and is not justified by any legitimate state interests, let alone a compelling one. In the case of Lofton and Doe, the statute's disqualification of Lofton from adopting Doe poses an immediate threat to the continuation of their 10 year parent-child relationship.

b. Defendant's statement.

Defendants maintain that Florida's adoption laws categorically disqualify a number of groups from the privilege of adoption, including sexually cohabiting unmarried couples and various types of convicted felons. Married persons are given clear preference in Florida's adoption scheme, against which backdrop the fact that homosexuals may not adopt is not remarkable. Other persons, like substance abusers and perpetrators of domestic violence, are excluded from adopting if their behavior threatens the child, and it is thus not true that these issues are ignored.

The statute withstands equal protection challenge in that it is rationally related to legitimate governmental goals in providing adopted children with mothers and fathers. The law is also a valid expression of public morality relating to homosexuality, both in terms of selecting appropriate childhood environments and in terms of what types of

households are entitled to legal recognition as families through adoption.

The statute also withstands fundamental rights challenge, in that adoption is a privilege, not a right. Plaintiffs' additional claims to have a liberty interest in remaining together fail, and would not confer a right to adopt in any event.

Finally, Defendants maintain that no Plaintiff has standing to assert either his equal protection or fundamental rights claims, and that as a result this Court is deprived of subject matter jurisdiction over the case.

II. Basis of Federal Jurisdiction

This is an action seeking redress of the deprivation under color of state law of rights secured by the United States Constitution in violation of 42 U.S.C. §§ 1983 and 1988. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

III. The Pleadings Raising the Issue

The Amended Complaint filed May 22, 2000, and the Answer to the First Amended Complaint, filed December 11, 2000.

IV. Undisposed Motions and Other Matters Requiring Action by the Court

1. Defendants' Motion for Summary Judgment
2. Defendants' Motion *in limine* to exclude the testimony of Timothy Arcaro

V. Concise Statement of Stipulated Facts

1. Individuals who have substance abuse problems, including drug or alcohol abuse, are not categorically

excluded from adopting children in Florida under any state law or regulation.

2. Persons with substance abuse problems are excluded from adopting children in Florida if it is determined that the abuse threatens the child.
3. People who engage in acts of domestic violence (except for those convicted of certain crimes of domestic violence), are not categorically excluded from adopting children in Florida under any state law or regulation.
4. Persons who engage in acts of domestic violence are excluded from adopting children in Florida if it is determined that the violence threatens the child.
5. DCF is not aware of any children who are in the Florida foster care system because of harm associated with the lesbian or gay orientation of their parents or caregivers.
6. Lesbians and gay men are not prohibited by any state law or regulation from serving as foster parents in Florida.
7. Lesbians and gay men have been licensed by DCF to be foster parents in Florida.
8. Florida children have been placed by DCF in long-term foster care with lesbian and gay foster parents.
9. Lesbians and gay men are not prohibited by any state law or regulation from being legal guardians of children.
10. Lesbians and gay men serve as guardians of children in Florida.
11. DCF has placed children in the guardianship of lesbians and gay men, and ceased DCF supervision.
12. Section 63.042(3), Fla. Statutes provides that "[n]o person eligible to adopt under this statue many adopt if that person is a homosexual."
13. Section 63.042(3), Fla. Stats. was enacted in 1977.

14. A primary purpose of Florida's adoption law is to provide all children who can benefit by it a permanent family life.
15. There are over 3400 children in Florida awaiting adoption.
16. Based on the most recent annual statistics available, 36% of children in DCF custody statewide were in foster care for more than 4 years prior to having a finalized adoption; 18.4% were in care for between 3 and 4 years; 25% were in care for between 2 and 3 years; and 17.7% were in care for 1-2 years.
17. Based on the most recent annual statistics available, 11.1% of what percentage of children in care for less than 1 year had 3 or more placements; 20.6% of children in care for 1 to 2 years had 3 or more placements; 32.9% of the children in care for 4 years or more three or more placements.
18. After reunification with parents or other family members, adoption is the preferred form of permanency under DCF regulations.
19. Adoption is the legal equivalent of a biological parent-child relationship.
20. Adoption is the permanency option that is the most secure against disruption of the parent-child relationship.
21. Children adopted out of the foster care system may be entitled to certain material benefits such as federal adoption assistance funding; state adoption incentives; health insurance from a parent's employer; and the right to support from the parent. Adopted children are also their parents' intestate heirs.
22. Long-term foster care is not a statutorily recognized permanency option for children under the age of 14.
23. There is no statute or regulation that prohibits single heterosexuals from being considered as adoptive parents.

24. In Florida, 25% of adoptions of children out of foster care are to single parents.
25. In District XI, 40.4% of adoptions of children out of foster care are to single parents.
26. Wayne LaRue Smith and Daniel Skahen applied to DCF to become adoptive parents, but their applications were denied on the sole basis of section 63.042(3), Fla. Stats.
27. Douglas Houghton has been the legal guardian of John Roe since March 1996.
28. Houghton had a favorable adoption home study conducted on May 19, 2000, but the evaluator concluded that he would not qualify to adopt Roe because he is gay and is therefore prohibited from adopting under section 63.042(3), Fla. Stats.
29. Steven Lofton has been a foster parent licensed by the State of Florida since 1988. He currently lives in Oregon with his three Florida foster children, two Oregon children, and his partner of 17 years, Roger Croteau.
30. Because two of his foster children have AIDS, as part of his agreement with DCF, Lofton was required to provide them with full-time care and therefore could not work outside of the home.
31. John Doe was born on April 29, 1991, and tested HIV positive, with both cocaine and marijuana present in his system at that time. At that time Doe entered care, and just over two months later was placed by DCF in foster care with Steven Lofton.
32. John Doe became free for adoption in May, 1994.
33. In September 1994, Lofton applied to adopt John Doe. His application was not considered because he did not answer question G, which asks applicants "Are you a homosexual?"
34. Some DCF caseworkers, supervisors and the District Administrator for District XI favored adoption of Doe by Lofton, knowing that he is gay.

35. Judge Lederman of the Juvenile Court found that it was in the "manifest best interest" of Doe and his siblings to relocate to Oregon with Lofton in June, 1998.
36. DCF agrees that Doe and Lofton have significant emotional ties.
37. Doe's permanency goal was changed to adoption no later than October 1994, and that remained his permanency goal through June 2000.
38. In May 2000, DCF changed Doe's permanency goal to long term foster care.
39. DCF documents reflect that Doe's permanency goal was changed back to adoption in or after December, 2000.
40. On June 25, 2001, Lofton's attorney sent a letter to DCF's attorney requesting assurance that Doe would not be removed from Lofton's care pending the outcome of this litigation.
41. On June 26, 2001, DCF's attorney responded that DCF is unable to provide the assurance requested.

VI. Issues of Fact that Remain to be Litigated

Plaintiff's position:

1. Whether section 63.042(3), which excludes lesbians and gay men and no other group from adopting, was enacted out of animus against lesbians and gay men.
2. Whether there is any legitimate, let alone important, reason for excluding lesbians and gay men, and no other group, from adopting children.
3. Whether there is a close fit between section 63.042(3)'s classification and an important basis for the statute.
4. Whether there is an intimate, highly personal parent-child relationship between Steven Lofton and John Doe.

5. Whether the inability to secure that relationship through adoption significantly burdens their parent-child relationship.
6. Whether there is an intimate, highly personal parent-child relationship between Douglas Houghton and John Roe.
7. Whether the inability to secure that relationship through adoption significantly burdens their parent-child relationship.

Defendant's position:

As to Equal Protection,

1. Whether it is in the best interest of a child to be raised by a father and a mother.
2. Whether male and female influences, including role modeling, are important to healthy child development.
3. Whether the absence of a mother or a father increases the risk of adverse child outcomes, including adjustment difficulties.
4. Whether as a matter of American historical and moral tradition, homosexual relationships and/or unions have never been accorded legal recognition as families.
5. Whether homosexuality is a moral issue.
6. Whether homosexuals are a suspect class.
7. Whether deviations from the dual-gender heterosexual family model poses issues related to child development, including increased risk of developmental and adjustment issues related to gender identity, sexual identity, and gender and sex role development.
8. Whether Florida's adoption law is rationally related to the goal of placing children through adoption in homes with mothers and fathers.

9. Whether Florida's adoption law is rationally related to the goal of limiting households which may be accorded legal recognition as a family.
10. The reliability of social science research relating to homosexual parenting.
11. Whether there is any historical or moral tradition in America supporting homosexual parenting and/or adoption as an equivalent alternative to traditional dual gender heterosexual two-parent families.

As to fundamental rights,

12. Whether there is any historical or moral tradition in America supporting a fundamental right of homosexuals to adopt children.
13. Whether there is any historical or moral tradition in America supporting a fundamental right of homosexual households to be recognized as families.
14. Whether homosexual relationships or homosexual adoption was historically recognized as giving rise to liberty or privacy rights of any kind.
15. Whether the Lofton or the Houghton households have any reasonable expectation of continuity so as to give rise to any liberty or other interest in remaining together.

As to standing,

16. Whether any Plaintiff has suffered an actual injury, or an immediate threat of future injury, as a result of the statute.

VII. Statement of Issues of Law for Which There is Agreement

1. Adoption is a privilege created by statute.
2. There is no right to adopt.

VIII. Statement of Issues of Law that Remain to be Litigated

Plaintiff's position:

1. Whether section 63.042(3), by excluding lesbians and gay men and no other class of persons from adopting, was enacted out of animus against lesbians and gay men, and thus, in violation of the equal protection clause of the 14th Amendment to the United States Constitution.
2. Whether section 63.042(3)'s exclusion of lesbians and gay men, and no other class of persons, from adopting, is justified by any legitimate, let alone important, state interest.
3. Whether there is a close fit between section 63.042(3)'s classification and an important state interest.
4. Whether section 63.042(3), Fla. Stats. significantly burdens plaintiffs Lofton and Doe's intimate, highly personal parent-child relationship, and thus, violates their right to privacy, intimate association and family integrity guaranteed by the First Amendment and the Due Process Clause of the 14th Amendment to the United States Constitution.
5. Whether section 63.042(3), Fla. Stats. significantly burdens plaintiffs Houghton and Roe's intimate, highly personal parent-child relationship, and thus, violates their right to privacy, intimate association and family integrity guaranteed by the First Amendment and the Due Process Clause of the 14th Amendment to the United States Constitution.

Defendant's position:

1. Whether under Plaintiffs' equal protection challenge, Florida's adoption law is reviewed for its rational relationship to a legitimate governmental interest.
2. Whether to prevail under their equal protection challenge, Plaintiffs must negate any rationally plausible basis for Florida's adoption law.
3. Whether homosexual relationships or homosexual adoption was historically recognized as giving rise to any rights so fundamental as to be implicit in the concept of ordered liberty, or to otherwise qualify as fundamental rights under Supreme Court precedents.
4. Whether any hypothetical liberty or other interest the Lofton and/or Houghton households have in remaining together can possibly give rise to the fundamental right to adopt.

IX. Exhibit List

Plaintiffs' Exhibit List is attached as Exhibit A and Defendants' List is attached as Exhibit B.

X. Witness List

Plaintiffs' Witness List is attached as Exhibit C and Defendants' List is attached as Exhibit D.

XI. Estimated Time For Trial

The parties estimate the trial will take between 7 and 10 days.

XII. Estimate of Attorney's Fees

Plaintiffs estimate that the adult plaintiffs would be entitled to approximately $300,000 and the child plaintiffs would be entitled to $100,000, in attorney's fees and litigation expenses pursuant to section 1983 U.S.C. should they prevail, but that defendants would not be entitled to any fees or expenses should they prevail.

Respectfully Submitted,

Dated: July 13, 2001

s/George H. Moss II /RCM by permission

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Supreme Court, U.S.
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No. 04-478

IN THE

Supreme Court of the United States

STEVEN LOFTON, *et al.*,

Petitioners,

v.

SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT

Petitioners brought this suit in May of 1999, asking that Florida's gay adoption law be declared unconstitutional on its face and as applied. The challenge was essentially twofold.

On one hand, Petitioners said the statute violated their fundamental rights of privacy, intimate association and family integrity by preventing the relationships between the child plaintiffs and their respective adult caregivers, Mr. Lofton and Mr. Houghton, from being made permanent via adoption. Pet. App. 145a-46a. It being undisputed below that there is no fundamental right to adopt or to be adopted, however, the district court and the court of appeals rejected Petitioners' family integrity claims, which are not raised as a basis for certiorari in this case. Pet. App. 11a-18a, 124a, 153a.

On the other hand, Petitioners also said that the statute violated their right to equal protection. Pet. App. 145a-46a. On equal protection, the chief defense of Florida's gay adoption law – which was the only defense accepted by the district court or the court of appeals – was that it was rationally related to the best interests of children in being placed for adoption in homes with married mothers and fathers. R3-117-(Defs. Motion for Summary Judgment ("MSJ") at 14-16). As Respondents pointed out below, prior case law from Florida and elsewhere had recognized that it is rational to believe that children need male and female influences to develop optimally, particularly in the areas of sexual and gender identity, and heterosexual role modeling. R3-117-(MSJ at 14-15). Respondents also pointed to a child's interest in stability, an interest rationally thought to be served by marriage. Pet. App. 128a.

In response, Petitioners failed to dispute that it is in the best interests of children to be raised by a mother and a father

who are married. They also failed to dispute that harms are posed to children when they are denied either a mother or a father. Instead, their position at summary judgment was as follows:

> The State points to an interest in providing children with both a mother and a father. They suggest that their analysis of any harms posed by the denial of both a mother and a father are undisputed by the Plaintiffs. Plaintiffs do not see the need to get into that expert discussion in this motion because the fact is that still wouldn't explain the classification.

R5-153-(Transcript of Oral Argument at 27).

Following Petitioners' rejection of "expert discussion" at summary judgment, the district court explained that the Petitioners in this case:

> did not object to nor disagree with Defendants' statements that married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes in their memorandum or during oral arguments. Plaintiffs have not asserted that they can demonstrate that homosexual families are equivalently stable, are able to provide proper gender identification, or are no more socially stigmatizing than married heterosexual families. It is Plaintiffs' burden as the one attacking the homosexual adoption provision to negate every conceivable basis which might support it. Plaintiffs have chosen not to do so[] and, thus,

> have left unchallenged Defendants' assertion that the best interest of a child is to be raised by a married family.

Pet. App. 129a-30a.

After summary judgment was entered against them, Petitioners submitted previously unfiled expert affidavits and DCF 30(b)(6) depositions, requesting the district court to reconsider the summary judgment in light of the new evidence. R4-144-(Reconsideration Motion at 14-18). The district court struck the new filing as untimely, and as an "unfair attempt to change the record for purposes of appeal." R4-155-(Order Denying Reconsideration at 3).

Despite the district court's ruling, Petitioners' brief with the Eleventh Circuit included the items previously stricken. After Respondents moved to strike the initial brief for including the items, the court of appeals allowed the record to be supplemented with them. In that process, Petitioners disavowed any reliance on the expert affidavits and 30(b)(6) depositions as to equal protection, and did not argue that the district court erred in striking them. Brief of Appellants, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) at 6 n.6; Reply of Appellants in Support of Motion to Correct or Modify the Record on Appeal, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) at 5.

Apart from those aspects of the case highlighted above, Respondents adopt the opinions of the district court and the court of appeals as their statement of this case.

REASONS FOR DENYING THE PETITION

Certiorari should be denied. Petitioners failed to preserve their argument that Florida's gay adoption law burdens any right of private adult sexual intimacy. They also failed to challenge the chief rational bases asserted in support of the law.

Petitioners also fail to show that the decision below or other lower court decisions have "disregarded" this Court's precedents in *Romer v. Evans*, 517 U.S. 620 (1996), or *Lawrence v. Texas*, 539 U.S. 538 (2003), or that there is any disparity in how these decisions are interpreted by the lower courts. Given that there is no conflict and no claim of conflict between the decision below and that of any other federal court, certiorari would be inappropriate.

I. PETITIONERS FAILED TO PRESERVE ANY CLAIM RELATING TO PRIVATE ADULT SEXUAL INTIMACY IN THIS CASE.

Petitioners assert that the Eleventh Circuit's decision in this case "profoundly misread" *Lawrence*, thereby "undermining the significance" of that opinion. The significance of *Lawrence*, they say, is that it described a "long established" right to private adult sexual intimacy that requires "heightened scrutiny" of the gay adoption law, under which the law "must fail." Pet. 21, 25.

The difficulty in this case is that Petitioners never raised any "long established" right of private adult sexual intimacy when they brought this suit. Nor did they ever suggest that it was an issue for trial. Pet. App. 151a-52a. Consequently, when the district court granted summary judgment, it began its analysis by noting pointedly and specifically that "Plaintiffs do not assert a right of privacy to sexuality or sexual practice between adults." Pet. App. 120a.

Petitioners never objected to nor disagreed with this statement by the district court, and did not assert any sexual privacy rights in the principal briefs at the court of appeals, either. It was only following the June, 2003 *Lawrence* decision that Petitioners raised any sexual privacy rights claim, which they did in supplemental briefing filed four months after oral argument at the court of appeals and nearly two years after summary judgment at the district court.

Of course, the Eleventh Circuit did address *Lawrence* on supplemental briefs, and it was not improper per se for Petitioners to raise the issue here. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). But the fact that the issue was not raised at the district court prevented the very inquiry Petitioners now say they want – a weighing of the relative interests served by the statute versus the interests served by what Petitioners call a "longstanding" right to adult sexual intimacy they say was applied in *Lawrence*. It is simply a different lawsuit than the one Petitioners chose to bring over five years ago. Given the undeveloped state of the factual record on point, this case is a poor vehicle for such an inquiry.

II. PETITIONERS FAILED TO CONTEST THE ASSERTED RATIONAL BASES FOR THE STATUTE.

This case is also a poor vehicle to resolve Petitioners' equal protection challenge. As noted earlier, *supra.* at 2-3, Petitioners defaulted on the question whether it is in the best interest of children to be placed in homes with married mothers and fathers, and on whether children are harmed by not having a mother and a father. Florida's interest in placing children with married mothers and fathers had been recognized as legitimate by Florida state courts. *See Amer v. Johnson*, 4 Fla.L.Wkly. Supp. 854 b (Fla. 17th Cir. 1997). It was presented to the district court in accordance with the procedure used in *Gregory*

v. Ashcroft, 501 U.S. 452 (1991)(prior state court case law recognition of rational bases for judges' mandatory retirement law supported dismissal of equal protection claims).

As Petitioners said at summary judgment, however, they saw no need to "get into that type of expert discussion." *Supra.* at 2. The record at summary judgment was therefore devoid of any expert testimony, social science studies or other items to dispute in any way that the Florida legislature could rationally have believed that it is in a child's best interests to be raised by a married mother and father, which was the chief interest Respondents put forward in support of the classification.

However imperfectly the gay adoption law may further the goal of placing adoptive children with married mothers and fathers, the legitimacy of that goal was never questioned below. Pet. App. 128a-29a. Given that heightened scrutiny is not applicable in this case, the petition does not present any substantial equal protection issues warranting certiorari.

III. THE DECISION BELOW AND THOSE OF OTHER LOWER COURTS HAVE BEEN FAITHFUL TO *LAWRENCE* AND *ROMER*.

Petitioners point to the decision in this and other cases, and say that certiorari is required because the lower courts are "disregarding" *Lawrence* and *Romer*. Pet. 19, 26-27. A fair review of the lower court decisions belies any such conclusion.

A. The court of appeals did not "disregard" *Lawrence* or *Romer* in deciding this case.

The decision below is absolutely faithful to the holdings and the rationales of *Lawrence* and *Romer*. Starting with *Lawrence*, the court of appeals carefully analyzed Petitioners'

claim that strict or heightened scrutiny was applicable to the gay adoption provision in this case. It rejected the claim only after performing a detailed analysis of *Lawrence* and concluding that because this Court itself used a rational basis review standard in striking down Texas' sodomy law, no heightened standard was therefore applicable to this case. Pet. 24-25.

Important among the Eleventh Circuit's reasons for this conclusion was that although this Court was asked by the petitioners in *Lawrence* and the ACLU as amicus to declare a fundamental right in *Lawrence*, the decision did not use the term "fundamental" in its discussion of the interests being protected. Pet. App. 19a-20a, Transcript of Oral Argument, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 1702534 at *4, 13; Brief Amici Curiae of the ACLU, *et al.*, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 164132 at *11 - 25. The court of appeals also noted that the decision did not include an explicit analysis of whether any such fundamental right was deeply rooted in American history or implicit in the concept of ordered liberty, or any "careful description" of the right, as this Court has said must be done in such cases. Pet. App. 19a-21a, *citing Washington v. Glucksberg*, 521 U.S. 572 (1997).

Petitioners maintain that the absence of any express declaration of a fundamental right in *Lawrence* results from the fact that the *Lawrence* Court did not create a new right, but simply applied to gay people a preexisting "well-established *Griswold/Eisenstadt* right to private adult intimacy." Pet. 25. It is this asserted right Petitioners belatedly claim is burdened by the gay adoption law, which they therefore assert is subject to heightened judicial scrutiny. *Id.*

There are a number of good reasons to doubt that *Lawrence* can fairly be read to require heightened scrutiny in the

context of this case. First, neither *Griswold v. Connecticut,* 381 U.S. 479 (1965), nor *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognized any right of private adult intimacy as such. The privacy right in those decisions, like *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l,* 431 U.S. 678 (1977), involved the personal and private decision whether or not to procreate. *See id.* at 688 n.5. Were it otherwise, such that a right of sexual intimacy had been "well established" long before *Lawrence,* Petitioners would not have waited until July, 2003 – two years after summary judgment – to raise a right of sexual privacy as to the adult plaintiffs in this case.

Second, to read so broad a right into *Lawrence* and apply it in this case would be inconsistent with the limits this Court placed on that decision. As was stated in *Lawrence*:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government. It is a promise of the Constitution that there is a

> realm of personal liberty which the government may not enter. [*Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)](internal quotations omitted). The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 578 (emphasis added).

Unlike *Lawrence*, this case does involve minors. It also involves whether the government of the State of Florida must give formal recognition via adoption to relationships lesbians and gay men may seek to enter. As the Eleventh Circuit noted, to extend Petitioners' broad reading of *Lawrence* to this case would extend it to both situations. Pet. App. 22a.

The most critical distinction between *Lawrence* and this case is that this case involves adoption, long recognized as a public act that does not implicate privacy rights. *See Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989); Pet. App. 9a, 22a. As a civil law having force only in the context of adoption, the gay adoption provision does not implicate the interest addressed in *Lawrence*, which was freedom from the fear of a criminal prosecution for consensual sexual intimacy in the privacy and security of the home. *Id.* at 578.

The distinction is a stark one as between criminalizing private sexual conduct between consenting adults on the one hand, and putting the state's imprimatur on sexual conduct in an adoptive home on the other. The Constitution may enjoin the former, but it cannot workably require the latter.

The narrow focus of the interest protected in *Lawrence* is illustrated by the narrow scope of the "fundamental right" this

Court was asked to declare, namely, the right of sexual intimacy in the privacy of the home, and the right to be "let alone" in that intimacy. Brief Amici Curiae of the ACLU, *et al.*, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 164132 at *25 (emphasis added). Consistent with that narrow scope, this Court emphasized in *Lawrence* that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id., citing Casey*, 505 U.S. at 847.

The government does not "enter" the world of a child being adopted from foster care. It is already there, standing in the stead of parents who have died or whose rights have been terminated. As the court of appeals recognized, it is proposed adoptive parents who seek to "enter" that realm, and who invite the government to appraise their parental qualities in a way it never could with natural parents. Pet. App. 9a, 22a.

Petitioners do not explain how any broad reading of *Lawrence* could be workably applied in the adoption context. In that context, Florida and the rest of the states have an obligation to evaluate prospective adoptive parents to determine which are best capable of caring for children and providing a secure family environment. Various legal criteria have been used in Florida and elsewhere to make that determination, many of which involve the most intimate and personal choices an individual can make about his or her life. Often these private choices enjoy fundamental rights status, such as marital status, whether to have children, where to live, what kind of work to do, or how to educate a child. In some states, like New York and California, religion is even a factor in adoptive placements, as it was in Florida until some recent rule changes. *See* N.Y. Family Law §116(e); Cal. Fam. Code §8709(a); Fla. Admin. Code § 65C-16.005(d) (2002). Notwithstanding the protection given to these private choices, they are routinely scrutinized by Florida and other states trying to match adoptive parents with

children. *See* Fla. Admin. Code § 65C-16.005(i) (adoptive parents to educate the child as to her "racial and ethnic heritage"); Fla. Stat. §63.042 (marital status); Fla. Admin. Code § 65C-16.005(e) (marital status); Fla. Admin. Code § 65C-16.005(j) (other children in family); Fla. Admin. Code § 65C-16.005(f) (residence in Florida); Fla. Admin. Code § 65C-16.005(g) (income level); Fla. Admin. Code § 65C-16.005(k) (working parents); Fla. Admin. Code § 65C-16.005(h) (housing and neighborhood).

To extend Petitioners' overbroad reading of *Lawrence* to this case would touch all such private choices. Administration of child welfare will be unprecedentedly difficult if every restriction in every adoption scheme in the country that intersects with a constitutional right has to be reviewed under heightened scrutiny.

Like laws creating complex social welfare systems that necessarily deal with the intimacies of family life, Florida's adoption law does not seek to "foist orthodoxy on the unwilling." *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). It is simply part of an adoption scheme by which all persons seeking the privilege of adoption – and not just lesbians and gay men – are screened in the process.

There is no express mention of heightened scrutiny being applied in *Lawrence*. Nor is there language explicitly grounding the decision either in substantive due process or in the *Eisenstadt/Carey* line of privacy cases. Given the holding in *Lawrence* that Texas' sodomy statute was invalid because it "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual," the court of appeals was justified in declining Petitioners' invitation to find that *Lawrence* requires any kind of heightened or strict scrutiny in this case. Pet. App. 22a. This is particularly true

where this case involves minors, formal recognition of relationships, and a civil law whose sole application is in the context of adoption, none of which were involved in *Lawrence*.

Petitioners next assert that this Court should grant certiorari because the court of appeals "disregarded" *Romer v. Evans*, 517 U.S. 620 (1996), in deciding this case. The truth, however, is that the facts of this case could hardly present a greater discontinuity with the facts of *Romer*, which provides no basis to disturb the decision below.

Romer involved a ballot initiative amending the Colorado Constitution to void all state and local sexual orientation non-discrimination laws. *Id.* at 624. This initiative, known as "Amendment 2," also prohibited any future "legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." *Id.* As a result, sexual orientation non-discrimination measures were forbidden to issue from any state or local legislature, executive branch, department, agency, political subdivision, municipality or school district except by another amendment of the Colorado Constitution by popular initiative. *Id.* at 624, 627.

The *Romer* Court described Amendment 2 as a measure whose "sweeping," "comprehensive," and "far-reaching" nature "[d]efied" equal protection analysis and "confound[ed]" the "normal process of judicial review." *Id.* at 627, 632. Although this Court did not go so far as to characterize Amendment 2 as a "per se" violation of equal protection as had been advocated in that case, it did state that the amendment was "unprecedented in our jurisprudence," and a "denial of equal protection of the laws in the most literal sense." *Id.* at 632-33.

The "unprecedented" and "confounding" nature of Colorado's Amendment 2 was central to the attack on its

constitutionality. As the ACLU told this Court when it argued *Romer*:

> The issue in [*Romer*] is not whether it might be rational to discriminate on the basis of sexual orientation in some specific context for some specific, legitimate purpose. The Court can and should leave for another day the question of whether some legitimate purpose can justify such limited discrimination.

Brief of Respondents, *Romer v. Evans*, 517 U.S. 620 (1996), *available at* 1995 WL 417786 at *47.

It does no violence to *Romer* to distinguish it from this case. As the decision below explains, Florida's adoption law classifies on the basis of homosexual conduct or activity, not orientation. Pet. App. 2a. Moreover, it does so in a very specific and limited context for specific, limited purposes. Limited purposes, it should be said, that the Petitioners have never seriously questioned.

In moving for summary judgment below, Respondents argued that the gay adoption law was rationally related to a child's best interest in being raised by a married mother and father. They also argued that it is rational to believe children are harmed to the extent they are deprived of either a mother or a father. Pet. 128a-29a.

Petitioners did not dispute either contention. Instead, they said that they did "not see the need to get into that expert discussion in this motion because the fact is that still wouldn't explain the classification." R5-153-(Transcript of Oral Argument at 27); *see also* Pet. App. 129a n.17.

Thus, as the district court noted, the Petitioners in this case "did not object to nor disagree" that it is in the best interest of children to be placed for adoption with married heterosexual families. Pet. App. 129a-30a. They never disputed that children are harmed by not having both a mother and a father, and never argued that lesbian or gay families were able to serve the interests of stability or gender identification as well as married couples. *Id.* They therefore "left unchallenged Defendants' assertion that the best interest of a child is to be raised by a married family." *Id.* In the face of the concessions they made at summary judgment, Petitioners are not in a position to say that any court has "disregarded" *Romer* in deciding this case.

Petitioners do take issue with disqualifying lesbians and gay men from adoption under the circumstances where several thousand foster care children are waiting for adoption at any one time. Pet. 19, 30. But a permanent home at any cost is not a goal of child welfare. If it were, foster children would not have been removed from their natural parents in the first place. As the court of appeals recognized, the reality is that any restriction on who can adopt necessarily reduces the pool of adoptive parents. Pet. App. 33a. The logic of Petitioners' arguments in this case, however, would make all restrictions on who may adopt constitutionally suspect so long as there is any backlog of children waiting for adoption. *Id.*

As to that backlog, Petitioners assert that Florida denies a "real childhood" to "thousands of children" so that it "may use its adoption law to tell the world it disapproves of gay people." Pet. 19. The facts are, however, that Petitioners never showed that the gay adoption provision has ever limited the number of adoptions in any statistically significant way, let alone "thousands" of them. Nor did they show that other states permitting adoption by lesbians and gay men have "thousands" fewer foster care children waiting to be adopted as a result, or

even that placement is any less of a problem in those states.

Petitioners also suggest that *Romer* compels a finding that the gay adoption law is irrational because lesbians and gay men are permitted to become foster parents or guardians in Florida. Pet. 23. The suggestion is misplaced, however, because it rests on the faulty premise that standards for foster care parents or guardians cannot be more liberal than standards for permanent adoption. Such a premise would call into constitutional question any tighter restriction on who may adopt versus who may foster or become a guardian.

Florida law recognizes foster care placements as short-term in nature for most children, and in fact forbids long term foster care as a permanency option for all children under fourteen. Fla. Stat. §39.623(1). The fact that in practice some foster care relationships for younger children may endure beyond short time frames represents a failure of the system, not a constitutional problem with the adoption law. *See Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 861 (1977) (Stewart, J., concurring).

As to guardians, there is continuing state court jurisdiction over any guardianship case, as Petitioners have acknowledged. Brief of Appellants, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) at 55. As they also admit, the statutes creating guardianships do not create the equivalent of unsupervised care of natural parents over their children the way adoption does. *Id.* at 53. The fact that lesbians or gay men can become foster parents or guardians is therefore not inconsistent with the Florida's adoption law, which seeks to establish permanent relationship bestowing a familial name, inheritance, and the duty of child support, none of which are available in the case of foster parent and guardianship relationships.

The question the petition seeks to present suggests that it is irrational categorically to disqualify lesbians and gay men from adopting but no one else. The truth, however, is that there are other categorical disqualifications, such as Fla. Stat. § 435.045, which prohibits felons convicted of certain domestic violence and child abuse crimes from adopting children out of foster care. Because that statute is incorporated by reference into the requirements of a home study, it also applies to private adoptions where a child is adopted by anyone other than a stepparent or relative. Fla. Stat. §§ 63.092(3)(b); 63.112(b). And the court may order the home study even in those cases. Fla. Stat. 63.112(3). Also, no child outside those exceptions may be placed in an adoptive home where any resident, not just the parent, is a sexual predator or habitual criminal under applicable Florida statutes. Fla. Stat. § 63.092(3).

While not expressed in terms of disqualifications, other statutes also have the effect of categorical disqualifications, in that only certain adoptions are authorized. For example, single people are allowed to adopt, but unlike the case of married couples, there is no provision for single people to adopt jointly. Fla. Stat. § 63.042. And, a single person cannot adopt unless he or she is at least eighteen years old. *Id.*

Petitioners assert that it is irrational categorically to disqualify lesbians and gay men from adopting but not categorically to disqualify drug and child abusers. Pet. 23. But it is stipulated in this case that people whose drug or child abuse threaten children are in practice never permitted to adopt in Florida. Pet. App. 148a. As the court of appeals recognized, Petitioners "offered no evidence that [substance abusers and perpetrators of domestic violence] are in reality ever permitted to adopt in Florida and actually have stipulated to the contrary." Pet. App. 28a n.18. As the Eleventh Circuit also set out:

> Florida law bars foster care and adoptive placements by DCF
>
> 1. In any case in which a record check reveals a felony conviction for child abuse, abandonment, or neglect; for spousal abuse; for a crime against children, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide but not including other physical assault or battery, if the department finds that a court of competent jurisdiction has determined that the felony was committed at any time; and
>
> 2. In any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if the department finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years. Fla. Stat. § 435.045(1)(a).

Pet. App. 28a n.18.

The realities of Florida's adoption scheme are thus more complex than Petitioners allow. This is a large part of the reason *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), does not mandate reversal in this case, as Petitioners suggest. Pet. 23. In that case, the burden of obtaining a special use permit was placed on a home for the mentally retarded, but was placed on no other type of use despite the fact that the governmental interests claimed to be served by the ordinance – like preventing the home's location in a 500-year flood plain – were equally implicated in the other types of uses. *Cleburne*, 473 U.S. at 447-49. In fact, as the Supreme Court repeatedly emphasized in *Cleburne*, no restrictions of any kind were placed

on other uses, which included "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged . . . , private clubs or fraternal orders." In contrast to the home for mentally retarded in that case, these uses were "freely permitted" and "freely located" in the area, notwithstanding any alleged 500-year flood plain concerns. *Id.* at 448, 451.

The type of disparity which concerned the Court in *Cleburne* does not exist here. It is simply not the case that substance and/or child abusers are "freely permitted" to adopt on an unrestricted basis while lesbians and gay men are not. Florida requires the abuse history of all potential adoptive parents to be investigated using the Florida Abuse Hotline Information System. Fla. Admin. Code § 65C-16.007. Those convicted of relevant felonies are barred by statute, as above. Fla. Stat. § 435.045. And Petitioners agree that no child or substance abuser whose abuse threatens a child is ever permitted to adopt in Florida. Pet. App. 148a.

Under these circumstances, what little if any disparity there may be between Florida's treatment of the adoptive applications of lesbian and gay men on the one hand and persons whose abuse would threaten a child on the other represents no more than the ordinary type of incrementalism that is well within the legislature's purview, even if its incremental approach is significantly overinclusive or underinclusive. As this Court has explained repeatedly, "'the problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.'" *Heller v. Doe,* 509 U.S. 312, 321 (1993), quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61 (1917); see also *F.C.C. v. Beach Communications*, 508 U.S. 307, 316 (1993); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Under this standard, a State

does not have to enact legislation with "mathematical precision," "exact wisdom," or "nice adaptation of remedies." *Beach Communications*, 508 U.S. at 317, n.7, citing *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338, 354 (1907). Given the "practical" problems of government, an incremental approach to legislation is constitutionally permissible. As this Court has stated:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Beach Communications, 508 U.S. at 316, *quoting Williamson v. Lee Optical*, 348 U.S. at 489.

Petitioners next suggest that under *Romer*, DCF's asserted rational bases for the gay adoption provision should not be credited where there is evidence that animus motivated the law.[1] Pet. 25. *Romer* does not say that. It merely confirms

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[1] On this point Petitioners suggest that the primary defense of Florida's gay adoption law was to express moral disapproval, which they equate with animus. Pet. 14. The record in this case, however, is that Respondents' lead argument at summary judgment was that the law was rationally related to the best interests of children in being adopted by married mothers and fathers. R3-117-(MSJ at 14-16). And, although Respondents did argue

well-settled law that animus by itself – a "bare desire to harm" without reference to any independent consideration in the public interest –will not support a law. *Id.* at 634-35, *citing United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

This Court has repeatedly made clear that the mere presence of some alleged animus in the legislative record will not invalidate a law if there are other permissible bases adduced in support of it. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). Had *Romer* been intended to change that, *Garrett* could not have been decided as it was.

Given its radically different context, *Romer* provides no analogy to the facts of this case. Far from "ignoring" *Romer*, the Eleventh Circuit carefully considered the factual and legal analyses in the decision and correctly rejected the Petitioners' argument that they undermined the district court's grant of summary judgment. Petitioners accordingly fail to show that certiorari is warranted based any "disregard" of *Romer*.

B. Petitioners fail to show that other lower courts have "disregarded" *Lawrence* or *Romer*.

Petitioners assert that *Romer* and *Lawrence* have been disregarded in other lower court decisions, in addition to this case. Pet. 19. The assertion lacks merit.

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that the law was constitutional as an expression of moral disapproval, they also clearly said that it promoted public morality, as well. *Id.* at 17-19. It is therefore not accurate to suggest that the court of appeals "recharacterized" the defense as promoting public morality as opposed to disapproval of homosexuality. Pet. 14. Finally, although Petitioners say the law was passed during a 1977 "crusade" to "demonize gay people as a public menace" (Pet. at 6), the law has survived numerous attempts to repeal it long since that time. Pet. App. 2a. The most recent attempt, Fla. SB 2538, died in committee on April 30, 2004.

The first such case, where Petitioners say "[t]he problem began," is the Eleventh Circuit's decision in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), upholding the Georgia Attorney General's firing of an openly lesbian attorney who had participated in a "marriage" ceremony with her partner. Pet. 26. *Shahar* predated *Lawrence* by six years, however, and obviously did not "disregard" that decision.

Nor did *Shahar* "disregard" *Romer*. As the Eleventh Circuit emphasized time and again in that decision, the critical distinction between the cases was that *Shahar* did not involve the state acting as a sovereign enforcing generally applicable laws, whereas *Romer* did. Instead, *Shahar* involved a state acting as an employer making employment decisions in regard to an employee in a policy-making position. *Id.* at 1102-04.

As the *Shahar* court explained, governmental acts are reviewed differently when government acts as an employer, due to a public employer's significant interest in achieving its goals effectively and efficiently. *Id.* at 1102 (citation omitted). As this Court has noted, "the review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.*, *quoting Rankin v. McPherson*, 483 U.S. 378, 384-86 (1987). Moreover, a public employee in a policy-making position is in a "special class" of employees who "might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers." *Id.* at 1103 (citations omitted).

Repeatedly stressing that *Shahar* was a governmental employer case, the Eleventh Circuit distinguished *Romer*, noting that the firing of one employee in *Shahar* did not involve "the same kind of decision as an across-the-board denial of legal protection to a group because of their condition, that is, sexual orientation or preference." *Id.* at 1102-04. It was precisely

because *Romer* involved the state acting as sovereign – and not as employer – that the Eleventh Circuit said "*Romer* is no employment case." *Id.* at 1104; *see* Pet. at 27.

The next opinion with which Petitioners take issue is *Equality Foundation v. Cincinnati*, 128 F.3d 289 (6th Cir. 1997), another pre-*Lawrence* case. In that case, the Sixth Circuit upheld a city charter amendment prohibiting municipal legislation granting special protection for gays and lesbians.

Petitioners suggest that *Equality Foundation* rested on a finding that it was "legitimate for government to discriminate against gay people in order to express its 'moral disapproval of homosexuality.'" Pet. 27. As Petitioners emphasized below, however, this statement was dicta, in that the Sixth Circuit expressly stated that it did not rest its decision on that ground. *Equality Foundation*, 128 F.3d at 301.

Far from the "casual regard" Petitioners say was paid to *Romer*, the detailed analysis reflected in the *Equality Foundation* decision shows that the Sixth Circuit faithfully applied the holding and rationale of *Romer* to the facts of that case. It simply found the cases distinguishable, since, unlike *Romer*, the city charter amendment at issue in *Equality Foundation* "did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally-enacted special protection from gays and lesbians." *Id.*

Petitioners next point to a pair of state court decisions, *Kansas v. Limon*, 32 Kan. App. 2d 369 (2004), *rev. granted* (Kan. May 25, 2004), and *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), which they suggest are "helping to create jurisprudence that destroys the central meaning of what this Court did in *Lawrence* and *Romer*." Pet. 27-28. The

truth is, however, that *Limon* is still winding through the Kansas state courts, with the Kansas Supreme Court only just having heard oral argument in late August, 2004. As to *Standhardt,* Petitioners themselves say that the part of the opinion with which they take issue is "gratuitous" dicta. Pet. 28. *See California v. Rooney*, 483 U.S. 307 (1987)(writ of certiorari dismissed as improvidently granted on grounds that this Court "reviews judgments, not statements in opinions").

Critically, the *Limon* case involved minors, while the *Standhardt* case involved the recognition of gay marriage. Where *Lawrence* explicitly warned that its reach did not necessarily extend to these situations, it would be unrealistic to expect lower courts to ignore that warning.

In short, Petitioners fail to show that cases like *Shahar* and *Equality Foundation* support certiorari any more now than they did when this Court denied certiorari in both of those cases. Neither they nor this case provide any example of a lower court "disregarding" *Lawrence* or *Romer*.

C. Petitioners fail to show any disparity in the lower courts' treatment of *Lawrence* or *Romer*.

Petitioners assert that this Court's precedents in *Romer* and *Lawrence* are subject to "diverse" treatment by the lower courts, some of which "disregard" the decisions while others "faithfully follow" them. Pet. 19, 26, 29. As shown above, however, none of the courts Petitioners complain about has "disregarded" either decision. As to the other courts Petitioners say "faithfully follow" *Lawrence* and *Romer*, Petitioners fail to show how they interpret *Lawrence* and *Romer* any differently.

Of the approximately 350 federal and state court decisions citing to *Romer* in the last eight years, Petitioners

recognize only three as "faithfully following" that case. Pet. 26. Of these, only one is a decision from a federal court of appeals. *Id.* Even as to those three decisions, the entirety of Petitioners' discussion of the facts, holdings and rationales of the cases is relegated to a string cite followed by a single footnote that provides no insight as to what supposedly makes their treatment of *Romer* distinctive. Pet. 26, *id.* at n.15.

The first – and only federal court of appeals – decision Petitioners cite as "faithfully following" *Romer* is *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). *Stemler*, however, is distinguishable from *Shahar*, *Equality Foundation*, and this case.

Stemler was a constitutional tort case involving police who arrested a woman they thought was a lesbian for drunk driving, but not a "far drunker" heterosexual driver with whom she had been arguing. *Id.* at 873. In reviewing the district court's 12(b)(6) dismissal of her equal protection claim, the Sixth Circuit emphasized that:

> A selective enforcement claim such as this one is . . . conceptually different from a claim that a statute violates equal protection; while almost every statute can be shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny, it will often be difficult to find a rational basis for a truly discriminatory application of a neutral law.

Id. at 874. Given that the defendants in *Stemler* were "unable, and indeed [did] not even attempt[] to demonstrate any rational basis for enforcing drunk-driving laws against homosexuals but

not heterosexuals," the Sixth Circuit concluded that the plaintiff stated an equal protection claim for selective prosecution and reversed the dismissal of her complaint. *Id.* at 874-75.

As a selective enforcement case in which the defense offered no rational basis of any kind for its challenged actions, *Stemler* has no parallel in *Shahar, Equality Foundation,* or this case. It is scant evidence of any disparity in the lower courts' application of *Romer,* and therefore does not support a grant of certiorari in this case.

In passing, Petitioners mention two other examples of district courts they say have "faithfully followed" *Lawrence* and *Romer,* being *Glover v. Willamsburg Local School Dist.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998), and *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998). Pet. 26. Both decisions, however, predate *Lawrence.* As to *Romer*, Petitioners do not explain how the treatment of that decision is any different in those cases than in this one. Particularly in light of the fact that *Glover* and *Weaver* are district court decisions, Petitioners fail to show how they evidence such disparity in the decisions as to warrant certiorari in this case.

The only other case of any kind Petitioners cite as "faithfully following" *Lawrence* is *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), which involved a challenge to Article 125 of the Uniform Code of Military Justice, prohibiting sodomy. Pet. 26. Why they do is unclear, however, because the court in *Marcum* expressly rejected an ACLU request – the same request it has made in this case – to find that *Lawrence* recognized a fundamental right of adult sexual intimacy requiring strict scrutiny. *Marcum*, 60 M.J. at 205. In rejecting that request, the *Marcum* Court refused to invalidate Article 125 as unconstitutional, and furthermore affirmed a service member's conviction for violating it. *Id.* at 205, 208. One of

the five judges, Chief Judge Crawford, wrote separately to say that she would not have even reached a *Lawrence* analysis on her view that sexual intimacy between military personnel of unequal ranks fell outside the scope of any liberty interest described in *Lawrence*, which expressly excluded relationships where consent might not easily be refused. *Id.* at 213 (Crawford, C.J., dissenting in part, concurring in part).

In *Marcum*, and in the later case of *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces has established a case by case analytical framework to determine whether the facts supporting a particular military prosecution under Article 125 fall inside or outside any liberty interest described in *Lawrence*, taking into account additional factors relevant solely to the military. *Stirewalt*, 60 M.J. at 304; *citing Marcum*, 60 M.J. at 206-07. Under that framework, both decisions affirmed sodomy convictions under Article 125. Notably, Petitioners do not cite to even a single instance where any military court at any level has reversed an Article 125 sodomy conviction based on *Lawrence*.

Like the Eleventh Circuit in this case, the *Marcum* Court observed that *Lawrence* never used the term "fundamental" in describing the interest at issue. Pet. App. 19a; *Marcum*, 60 M.J. at 205. Like the Eleventh Circuit in this case, the *Marcum* Court perceived that this Court did not expressly state that it was applying any form of heightened scrutiny in *Lawrence*. Pet. App. 21a; *Marcum*, 60 M.J. at 205. And like the Eleventh Circuit in this case, the *Marcum* Court noted the circumstances in which *Lawrence* indicated it would not necessarily hold force. Pet. App. 22a; *Marcum*, 60 M.J. at 207-08.

In upholding Article 125, the *Marcum* Court emphasized that this Court has never said that all liberty or privacy interests

are protected as fundamental rights. *Marcum*, 60 M.J. at 205. This is exactly the same point Judge Birch made in his special concurrence to the denial of rehearing en banc in this case. Pet. App. 67a-68a. Under the circumstances where the *Marcum* Court has echoed the Eleventh Circuit in refusing to find that *Lawrence* recognized any new or preexisting fundamental right requiring strict scrutiny – and used a similar analysis in so doing – *Marcum* cannot point up any disparity in the lower courts' treatment of *Lawrence* that could possibly warrant certiorari. And no such disparity would merit certiorari now, where the issues are new enough – particularly in the case of *Lawrence* – to benefit from percolation in the lower courts.

There is of course no conflict present in the decisions discussed in the petition, and Petitioners rightly do not claim that one exists. The most they will say is that there is a "diversity of views" regarding *Lawrence* and *Romer*. Pet. 29. As shown above, however, such diversity as may exist in the decisions is in the facts of the cases, and not on their application of the holdings or the rationales of *Lawrence* and *Romer*.

Strikingly, Petitioners disclaim any argument that the outcome in *Shahar, Equality Foundation* or *Limon* would have been any different had *Lawrence* and *Romer* been applied to the facts of those cases in the way they advocate. Pet. 29. Given that Petitioners will not even say that the results in the cases they complain about would be any different if they were to obtain the relief requested, any claim that the issues in this case are so "important" as to warrant certiorari is undermined, and fatally so.

CONCLUSION

The petition for writ of certiorari should be denied.[2]

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[2] Petitioners suggest this Court should hold this case on account of the recess appointment of Judge Pryor to the court of appeals. Pet. 30. Since the petition was filed, however, the court of appeals has upheld Judge Pryor's appointment in *Stephens v. Evans*, 387 F.3d 1200 (11th Cir. 2004), a case squarely addressing at length the issue Petitioners mention in a passing footnote. Pet. 1 n.2. Because Petitioners never raised any question about Judge Pryor's February, 2004 appointment until after the July, 2004 denial of rehearing en banc, the issue was never addressed on the merits in this case. *Stephens* therefore represents a cleaner vehicle for any review of Judge Pryor's appointment, because this case presents the additional issues of whether Petitioners have waived the argument and whether Judge Pryor's acts in office are valid in any event under the de facto officer doctrine. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003). For the same reason, the issue is not fairly included by the question presented within the meaning of Rule 14.1.

(3)

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IN THE

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STEVEN LOFTON, *et al.*,

Petitioners,

—v.—

SECRETARY OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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THIS CASE PLAINLY POSES THE QUESTION WHETHER FLORIDA MAY, IN ORDER TO EXPRESS ITS DISAPPROVAL, REFUSE TO EVALUATE GAY PEOPLE AS ADOPTIVE PARENTS.

This case presents a critically important and properly raised question of constitutional law: May a state use its adoption laws to express the state's disapproval of gay people? Florida argues that the Court should not take this case for two reasons, both of which miss the mark.

First, Florida contends that petitioners did not preserve their claim that the challenged statute burdens the protected liberty recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003). Petitioners, the State says, raised the issue too late. In fact, petitioners made this claim at their first opportunity, it was thoroughly addressed by the parties and the Court of Appeals, and no further development of the record would be helpful in deciding the issue before this Court.

Florida also asserts that petitioners did not challenge a chief rational basis asserted in support of the law, a hypothetical child welfare rationale. Opp. Cert., at 4. Since the undisputed record establishes that the true purpose of Florida's law was to express disapproval of gay people, its *post hoc* reliance on a hypothetical rational basis is legally irrelevant. Moreover, while petitioners did not offer an empirical challenge to one of the premises on which the State's hypothetical argument was based, they showed both in theory and in fact that the law could not rationally be thought to promote a legitimate aim.

A. A More Complete View of the Record.

In making its argument, the State of Florida overlooked one crucial part of the record and took an incomplete look at another.

1. It is undisputed that Florida banned gay people from its adoption process to express its official disapproval of gay people.

Florida has never disputed the record evidence on why it bans adoption by gay people. The undisputed evidence shows that the plain and well-understood purpose of the ban was to tell gay people to go back into the closet. App. 136a, ¶ 113. Similarly, Florida does not dispute the legislative history of the ban laid out in Judge Barkett's dissent from the denial of rehearing in the Eleventh Circuit. That history shows that the exclusion was adopted as part of a political campaign against gay people and that it had nothing to do with child welfare. App. 91a-94a.

2. Florida singles out gay people, and no one else, for categorical exclusion from its adoption process.

Florida suggests that child abusers, substance abusers and spouse abusers are, like gay people, also categorically excluded from the adoption process. Opp. Cert., at 16-18. But the laws the State relies on only exclude those who are arrested, prosecuted *and* convicted of designated violent felonies. (Those convicted of drug—but not alcohol—abuse are excluded only for five years.) Fla. Stat. § 435.045(1)(a). Thus, it is only those who have been adjudicated guilty of the crimes most dangerous to children who are excluded. As the State in fact stipulated, all others whom it knows engage in acts of domestic violence and who have problems with drug and alcohol abuse are not categorically excluded from the adoption process. App. 147a-148a, ¶¶ 1, 3. On the contrary, the State gives a special review to cases involving applicants with "verified findings of [child] abuse" who have not been convicted of felonies. Fla. Admin. Code § 65C-16.005(9)(a)2.

Petitioners did agree that abusers who are found to represent a threat to children are not approved at the end of that evaluation process. App. 148a, ¶¶ 2, 4. Florida, however,

misrepresents that acknowledgment as a stipulation that gay people receive equivalent treatment in the adoption process. Just the opposite is true. Petitioners have argued throughout these proceedings that gay people are excluded without any determination, through a criminal court or an administrative process, that they represent a threat to children. Fla. Stat. § 63.042 (3). This case is about the fact that gay people are denied the very case-by-case evaluation that abusers receive.

B. The applicability of *Lawrence v. Texas* to this case is squarely and fully presented.

It is true that petitioners did not argue that *Lawrence* applied to this case until after this case had been initially briefed and argued in the Eleventh Circuit. That is because *Lawrence* was not decided until then. It is also true that although the right vindicated in *Lawrence* was a "longstanding" right, petitioners did not argue it until *Lawrence* was decided. That is because *Bowers v. Hardwick*, 478 U.S. 186 (1986), foreclosed its application to this case until then. Once *Lawrence* was decided, it was extensively briefed at the Court of Appeals, which treated the issue as properly before it and dealt with it in considerable detail. App. 18a-22a.

There is no need for a more extensive record to decide if *Lawrence* applies to this case. There is no dispute that the adult petitioners are gay; all agree, for example, that Mr. Lofton has been raising Florida children for over 17 years with his partner of 20 years, Roger Croteau. App. 1441a-142a. And there is no dispute that Florida refuses to evaluate gay people as prospective adoptive parents.[1] That is all that is

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[1] The Eleventh Circuit and now the State insist the State only disqualifies gay people who are sexually intimate (App. 39a; Opp. Cert., at 13), although a high ranking DCF official testified that the challenged law bars adoption by all gay people. R. 131 (Deposition of Linda Radigan, at 154-55). It matters

needed to decide if *Lawrence* applies.

If Florida's adoption law were supported by genuine, legitimate state interests, it would be for the District Court on remand to weigh those interests against the protected liberty identified in *Lawrence*. 539 U.S. at 578. But given the undisputed fact that this law was passed to express disapproval of gay people, it cannot survive the heightened scrutiny that *Lawrence* demands under either Due Process or Equal Protection. *Id.*, at 578.

The State's claim that applying *Lawrence* here will require rigorous scrutiny of every factor the State examines in the evaluation process has no merit. Opp. Cert., at 10-11. There is a world of difference between completely excluding someone exercising a constitutionally protected liberty, and asking how an individual's exercise of a liberty affects his or her suitability for a particular adoption. *See Planned Parenthood of Southeastern Pa. v. Casey* 505 U.S.833, 873-77 (1992) (regulation that has an incidental effect on a protected liberty is reviewed more deferentially than one that places a substantial burden on it); *compare Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *with Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Besides, if a state takes a constitutionally protected liberty into account in adoption, and has nothing more than disapproval to justify doing so, it should not to be able to take the constitutional liberty into account at all.

C. The issue of whether legislation to express disapproval of gay people is permissible under rational basis review is also squarely presented.

It may be that a purely hypothetical rationale would be enough to uphold a law under rational basis review if there were, as the State puts it, nothing more than "the mere

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not, since *Lawrence* protects the right to be intimate.

presence of some alleged animus in the legislative record . . . ." Opp.-Cert. at. 20; *see Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001). But for two reasons, that is not this case.

First, this is not a case where bias has to be inferred from the lack of any other explanation for a classification. *Cf. Romer v. Evans*, 517 U.S. 620, 634-35 (1996). Nor is this a case where bias has to be inferred from the failure of a supposed rational basis to explain why a group has been singled out while others who are similarly situated receive better treatment. *Cf. Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985).

This is, instead, a case in which the undisputed facts establish that this law was passed to express disapproval of gay people, and for no other reason. Florida did not exclude gay people from its adoption process out of insensitivity or indifference. *Cf. Garrett,* 531 U.S. at 374-75 (Kennedy, J., joined by O'Connor, J., concurring). This law was driven by animosity, "something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635.

Second, far from having an agreed-to "rational basis," the law in this case remains bereft of any legitimate rationale that makes any sense at all. It is true the petitioners agree, as they always have, that promoting the best interests of children is a legitimate goal. R. 129, at 4-5. It is also true that, like the State, petitioners offered no expert testimony about the comparative virtues of gay people and heterosexuals as parents.[2] R. 117, 119, 129, 130.

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[2] The State suggests that after the summary judgment motion, petitioners attempted to supplement the record to provide expert testimony on the comparative ability of gay people and heterosexuals as parents. Opp. Cert., at 3. But the evidence, which the Eleventh Circuit ruled belonged in the record, was directed at the plaintiff families' expectation of permanence, relevant to the separate Due Process claim not before this Court, and the impact of abuse on children, relevant to the State's failure to categorically

But not offering expert evidence to refute the premises on which a rational basis argument is based is hardly the same thing as failing to challenge the argument at all. While one may offer evidence to show that one or more of the assumptions that lie beneath a rational basis argument are in fact untenable (*see Minn. v. Cloverleaf Creamery Co.*, 449 U.S. 456, 463-4 (1981)), the far more common practice is to show that the argument makes no logical sense in theory (*see Romer*, 517 U.S. at 632–34; *Hooper v. Bernalillo County*, 472 U.S. 612, 618-20 (1985)), connects as a matter of logic to a purpose that is not legitimate (*see Cleburne*, 473 U.S. at 448-50), or cannot be sustained purely as a matter of logic in light of admitted facts (*see Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va.*, 488 U.S. 336, 343-44 (1980); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-38 (1973)).

Petitioners in this case use all three techniques to demonstrate that Florida's "rational basis" is irrational.

First, petitioners point out that Florida's suggested rationale is based on a negative stereotype since it is based on the assumption that gay people as a group are inferior as parents. An unsubstantiated negative stereotype cannot provide a legitimate basis for discrimination. *Cleburne*, 473 U.S. at 448-50. Significantly, the State not only refuses to substantiate its charge, the charge is in fact undercut by its own child welfare officials, who testified that they know of no child welfare basis to exclude gay people from adopting, and the State's own practice of permanently placing children with gay parents.[3] App. 135a, ¶¶ 5-8; App. 148a, ¶¶ 6-11.

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exclude abusers. See R. 144, 145. It was not offered to refute empirically the State's assertion that married heterosexual couples are optimal.

[3] In this Court for the first time, Florida has suggested not that placement with married heterosexuals is "optimal," R. 117, at 16, but that placement with gay

Second, petitioners show that it is logically impossible to think that excluding gay people from the evaluation process will have the effect of placing children with married heterosexuals. The State places children with every qualified married heterosexual couple willing to adopt that it can find. It has thousands ready for adoption left. It places children with all the qualified single heterosexuals willing to adopt it can find. It has thousands ready for adoption left, and their numbers are apparently growing alarmingly. App. 149a-150a, ¶¶ 15-17, 23-25; *Amicus* Brief of Child Welfare League of America in support of *certiorari*, at 8. With a large and growing surplus of children eligible to be adopted, it is not rational to think keeping gay people out of the process will increase the number of placements with heterosexuals.

Finally, petitioners point out that it is simply not credible that Florida categorically excludes gay people from the process to benefit children, when at the same time it: 1) permanently places children in its care with gay people, and 2) allows substance and domestic abusers to apply and be evaluated. Florida tells this Court that permanent placement with gay people is not the same thing as adoption, which confers the right to inherit, a parent's name, and a duty of support. Opp. Cert., at 15. But Florida does not explain how it serves the best interest of its children by giving them *de facto* permanent gay parents but denying them the right to inherit, their parents' names, and the obligation of support.

What remains is what the State tells this Court is Florida's desire to promote "public morality." The State explained to the District Court what precept of "public morality" it aimed to promote with this law:

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people would be "harmful." Opp. Cert., at 2. That even more negative stereotype is similarly unsubstantiated and, at the very least, is hardly credible in light of its decision to place children in *de facto* permanent placements with gay parents.

> It is constitutionally permissible to enact legislation in furtherance of public morality, to express moral disapproval of homosexuality.

R. 117, at 16-17.

The issue of whether Florida may use its adoption law to express its disapproval of gay people is thus squarely presented by this record.

D. The case for review by this Court grows stronger with the passage of time.

1. Even though the sessions of most state legislatures have not yet begun, there is already a proposal in Kentucky that would bar gay people from adopting or being foster parents. H.B. 661, Reg. Sess. (Ky. 2004). Similar legislative proposals are expected in other states. As the Child Welfare League of America points out in its brief in support of the petition, proposals like this one would overturn well-established child welfare practice and exacerbate an already critical shortage of adoptive parents. *Amicus* Brief of Child Welfare League of America in support of *certiorari*, at 7-10. State legislatures should know whether their adoption laws are to be based on the best interests of children or whether they can, like Florida, pass them to express disapproval of gay people.

2. The State's Brief in Opposition is a fine illustration of just how litigants are attempting to evade this Court's decisions in *Lawrence* and *Romer*. The opposition, like the panel at the Court of Appeals and like the courts in *Equality Found. v. Cincinnati*, 128 F.3d. 289 (6th Cir. 1997), *cert. den.*, 525 U.S. 943 (1998), and *Kansas v. Limon*, 32 Kan. App. 2d 369 (2004), *rev. granted* (Kan. May 25, 2004), insists that states may discriminate against gay people to express their disapproval so long as that disapproval is labeled "public morality." It insists, like the panel and the courts in *Shahar v.*

Bowers, 114 F.3d 1097 (11th Cir. 1997), *cert. den.*, 522 U.S. 1049 (1998), and *Limon*, that *Romer* only forbids discrimination for its own sake in measures that are sweeping in their breadth. The Brief in Opposition insists that neither *Griswold v. Conn.*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), nor *Lawrence* itself recognize a protected liberty in private adult intimacy, and that *Lawrence* is a minimum scrutiny rational basis case essentially limited to the situation that gave rise to it.

That litigants will make arguments like these is perhaps to be expected. That Courts of Appeals and state appellate courts would accept them is not. It is time for this Court to make it clear once and for all that the Constitution does not permit a state to legislate about children so that it can tell the world that it disapproves of gay people.

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MOTION OF THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE

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MOTION OF THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the rules of this Court, the Child Welfare League of America (CWLA) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the court of appeals for the Eleventh Circuit in *Lofton* v. *Secretary of Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004). Petitioners have consented to the filing of the attached brief. Respondents have declined to consent. Petitioners' letter consenting to the filing of this brief is on file with the Clerk of the Court.

In this case, the court of appeals held that Florida's categorical exclusion of gay men and lesbians from consideration as adoptive parents, Fla. Stat. ch. 63.042(3),

was rationally related to the State's goal of promoting the best interests of children. This holding is of fundamental interest to the CWLA, an 84-year-old association of more than 1000 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected, and vulnerable children and youth every year.

CWLA is in a unique position to aid the Court in its consideration of the issues presented. Since its founding in 1920, CWLA has been a leader in the development of quality programming, practices, and policies in all areas of child welfare and child well-being. CWLA's Standards of Excellence for Adoption Services reflect what the child welfare field recognizes as the best child welfare practices. These standards set forth, among other things, principles for evaluating applicants as adoptive parents. Accordingly, CWLA respectfully requests that the Court grant this motion for leave to file a brief *amicus curiae*.

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Amicus curiae Child Welfare League of America (CWLA) respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICUS CURIAE

The CWLA is an 84-year-old association of more than 1000 public and private child- and family-service agencies that collectively serve more than 3 million abused, neglected, and vulnerable children and youth every year. Since its founding in 1920, CWLA has been a leader in the development of quality programming, practices, and policies in all areas of child welfare and child well-being. CWLA's Standards of Excellence for Adoption Services reflect what the child welfare field recognizes as the best child welfare practices. These standards set forth, among other things, principles for evaluating applicants as adoptive parents. In all of its work, CWLA strives to ensure that every child and young person is provided with the best opportunity to achieve his or her full potential.

REASONS FOR GRANTING THE WRIT

This case directly and adversely affects the welfare of children. The court of appeals incorrectly held that Florida's categorical exclusion of gay men and lesbians from consideration as adoptive parents, Fla. Stat. ch. 63.042(3), was rationally related to the State's goal of promoting the best interests of children. In fact, Florida's policy is contrary to the best interests of the thousands of children in Florida awaiting a permanent home. It bears no rational relationship to the stated goals of Florida's adoption statute or any other child welfare aim.

Petitioners and many other prospective parents who happen to be gay are prepared to open their hearts and their homes to children in need, to make the sacrifices and to

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the CWLA and its counsel made any monetary contribution toward the preparation and submission of this brief. Petitioners' letter consenting to the filing of this brief is on file with the Clerk of the Court.

experience the joys that come with raising children. Yet despite a chronic and severe shortage of qualified parents, Florida has decided to ban this one group of willing parents from adopting—even if they otherwise pass the rigorous screening process that Florida imposes to ensure that prospective adoptive parents are qualified and even if they would be the best fit for a particular child in need of a permanent home. The result is to deny many children the chance to be adopted by loving, caring parents with whom they would flourish.

Florida's ban is a radical departure from the nationwide consensus that adoption decisions should be made by professionals on a case-by-case basis and based on the best interests of the child. Indeed, Florida is alone among the States in excluding gay men and lesbians from the pool of adoptive parents. The widespread view in the field is that a categorical prohibition on adoption by gay men and lesbians lacks a rational relationship to any legitimate child welfare goal and works against the interests of children. The positions of every authoritative child welfare or child health organization of which the CWLA is aware contradict the assumption—implicit and explicit in the court of appeals' opinion—that gay and lesbian parents and the children being raised by them are inferior to heterosexual families.

Petitioners' constitutional claims present important questions of federal law and, from the perspective of the CWLA, crucial issues for the welfare of children. This Court should grant a writ of certiorari.

I. FLORIDA'S CATEGORICAL BAN ON ADOPTION BY GAY PARENTS UNDERMINES THE PREVAILING INDIVIDUALIZED, CASE-BY-CASE APPROACH TO ADOPTION PLACEMENT AND IS DETRIMENTAL TO THE BEST INTERESTS OF CHILDREN

Florida's policy denies thousands of children the opportunity to be adopted by loving, capable, and willing parents. In this manner, Florida "spites its own articulated goal[]," *Stanley* v. *Illinois*, 405 U.S. 645, 653 (1972), of serving the best interests of Florida's adoptive children

through provision of permanent homes suited to their individual needs.

A. As Florida Recognizes, Adoption Is In The Best Interest Of Children Whose Parents Either Cannot Or Will Not Raise Them

There is no doubt adoption by a loving and capable parent is in the best interests of children whose biological parents either cannot or will not take care of them. Florida itself has recognized adoption as "the primary permanency option" for a child who cannot be reunited with his or her biological parents. Fla. Stat. ch. 39.621(2). Florida's strong policy is supported by widespread agreement among child welfare professionals that "[a]doption works." Myrna L. Friedlander, *Adoption: Misunderstood, Mythologized, Marginalized*, 31 Counseling Psychologist 745, 748 (2003). The consensus among experts is that adopted children "function more adequately at the personal, social, and economic level compared with those who were formerly fostered and, particularly, those who grew up for a large part of their lives in institutions."[2] John Triseliotis & Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, in *The Psychology of Adoption* 107, 107 (David M. Brodzinsky & Marshall D. Schechter eds., 1990).

In particular, adoption facilitates the development of an attachment relationship—a "reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver." Beverly James, *Handbook for Treatment of Attachment-Trauma Problems in Children* 2 (1994). Attachment relationships form "the cornerstone for healthy psychological adjustment, affecting development not only in infancy and childhood but in adulthood as well." David M. Brodzinsky et al., *Children's Adjustment to Adoption:*

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[2] *See also* Daniel Pilowsky, *Psychopathology Among Children Placed in Family Foster Care*, 46 Psychiatric Servs. 906, 906, 908-909 (1995) (finding children placed in foster care exhibit greater prevalence of depression, theft, drug use, vandalism, and gang membership than adopted children or children raised by their biological parents).

Developmental and Clinical Issues 13 (1998). Because adoption provides security and stability for the child, it is the placement option most likely to foster strong attachment relationships for children whose biological parents are unavailable and therefore unable to care for them.

The alternatives to adoption simply cannot provide the stability and the security needed for optimal development. The Florida Legislature has specifically found that foster care "often fails to meet the needs of children," Fla. Stat. ch. 409.1673(1)(a)(1), in part because children "are often inappropriately and repeatedly placed in the foster care system ... [and] lack a stable environment," Fla. Stat. ch. 409.1673(1)(b). Multiple placements mean multiple caregivers and prevent a child from forming a lasting attachment to a nurturing, caring adult.[3] In addition to lacking the stability of adoption, foster care and legal guardianship do not—as the court of appeals recognized—have "the societal, cultural, and legal significance [of] adoptive parenthood, which is the legal equivalent of natural parenthood." Pet. App. 34a. Thus, even for a fortunate child in a favorable long-term foster care or guardianship placement, adoption is preferable.

B. To Meet The Needs Of Children Awaiting Adoption, Well-Established Child Welfare Practice Rejects Categorical Exclusions Of Adoption Applicants In Favor Of Individualized Evaluation Of Each Potential Parent-Child Match

Over the past 30 years, the States have moved decisively away from the narrow view that adoption should occur only when placement can be found in what were once

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[3] *See* David M. Brodzinsky & Ellen Pinderhughes, *Parenting and Child Development in Adoptive Families*, in 1 *Handbook of Parenting* 279, 288 (Marc H. Bornstein ed., 2d ed. 2002) (stating "risk for attachment problems" increases when children "experience multiple caregivers"); Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (2000) (stating multiple placements inhibit child's "relationship with an adult who is nurturing, protective, and fosters trust and security").

viewed as "ideal families": young, middle-class, married couples. Until the 1960s and 1970s, many States excluded adoption applicants who fell short of that ideal, such as adults with physical disabilities, single adults, older couples, and low-income families. *See* Alice Bussiere, *The Development of Adoption Law*, 1 Adoption Q. 3, 6 (1998); *see also* Brodzinsky & Pinderhughes, *supra* n.3, at 280-281. States also restricted certain other adoption placements, such as interracial adoptions. *See* Brodzinsky & Pinderhughes, *supra* n.3, at 299-300. Although many States and adoption agencies may have previously "thought it better to leave a child in foster or institutional care without an adoptive home rather than to place the child in a 'mismatched' home," the "goal of providing a child with a permanent home has become primary." Joan Heifetz Hollinger et al., 1 Adoption Law and Practice § 3.06[1], at 3-39 to 3-40 (2003); *see also* Bussiere, *supra*, at 7.

By broadening the pool of prospective adoptive parents to include those "who had previously been excluded, such as older couples with children and single parents," States improved the ability of professional child welfare experts to better match a child's individual needs with the strengths and skills offered by each potential adoptive parent. Bussiere, *supra*, at 8. No two children (or adults) are exactly alike: one child may fare better if his or her adoptive parents have other children, another may be better off as an only child. A child, such as John Doe in this case, may have medical problems and might benefit from having an adoptive parent with medical expertise. All other things being equal, the more potential adoptive parents, the greater the likelihood that adoption experts will be able to make a placement that promotes the child's best interests.

Florida has generally followed the trend toward permanent placement based on individual evaluations and away from excluding entire groups from the pool of adoptive parents. *See* Fla. Stat. ch. 63.022(2) (stating "the best interest of the child should govern and be of foremost concern"), 63.022(3) (Legislature's intent is to "provide to all children who can benefit by it a permanent family life"). To

facilitate optimal placement, the Florida Department of Children and Families (DCF) conducts a detailed evaluation of each candidate's fitness to parent a particular child.[4] Other than gay men and lesbians, no other group of adults in Florida is categorically prohibited from adopting. Married couples, single adults, adults with physical disabilities, divorced men and women, parents of a different race than the adoptive child—all may adopt.[5] *See* Fla. Stat. ch. 63.042(2), (4); Fla. Admin. Code r. 65C-16.005(1). Even convicted felons are not categorically barred from adopting.[6] The State's categorical exclusion of gay men and lesbians is therefore a striking departure from an otherwise consistent and coherent scheme to match the needs of individual

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[4] Florida has a detailed procedure to ensure the appropriateness of a proposed adoptive placement for the child. *See, e.g.*, Fla. Stat. chs. 63.092(3) (requiring preliminary home study prior to placement in intended adoptive home), 63.125(1) (requiring "final home investigation" before adoption placement becomes final). In determining "which applications for adoption should be approved," the DCF evaluates the "child's choice"; "ability and willingness" of the prospective parent to adopt "some or all of a sibling group"; commitment of the parent to foster the child's knowledge and appreciation of his or her "racial and ethnic heritage"; "child rearing" experience of the parent; stability of the parent's marriage, if applicable; future residency of the parent; parent's income; and the ability of the parent to provide adequate shelter, medical care, attention, and support. Fla. Admin. Code r. 65C-16.005(2) to (3).

[5] The court of appeals was therefore wrong to conclude that Florida promotes adoption only in "optimal" married-couple homes. Florida does not express a preference for married over unmarried couples or singles in the area of adoption. *See* Pet. App. 83a (Barkett, J., dissenting from denial of rehearing en banc). Florida accepts applications to adopt from single adults, *see* Fla. Admin. Code r. 65C-16.005(3)(e), and has placed many adopted children with single parents. Florida's policy, consistent with the overwhelming national consensus, is to encourage adoption, *period*, because adoption by even a single loving parent is better for a child's welfare than living in foster care, group homes, and the like.

[6] For individuals convicted of certain felonies, such as homicide, rape, sexual assault, child or spousal abuse, or child pornography, "[a]pproval shall not be granted" to adopt children who are in state custody. Fla. Stat. ch. 435.045(1)(a). Those individuals are not, however, prohibited from adopting other children.

children with the abilities and circumstances of individual adults.

C. By Categorically Excluding Gay Men And Lesbians From The Pool Of Adults Eligible To Adopt, Florida's Statute Undermines The Best Interests Of Children

The prohibition on adoption by gay men and lesbians prevents child welfare experts from making the optimal child-parent match where a gay or lesbian parent can best meet the needs of a particular child. For example, a child whose best adoptive placement might be with a gay or lesbian relative—such as a lesbian aunt or a gay grandfather—rather than a non-relative will be denied that placement under the statute. Florida itself recognizes the desirability of placing children with relatives where possible. *See* Fla. Stat. ch. 39.5085 (establishing "Relative Caregiver Program"); Fla. Admin. Code r. 65C-24.001 to 24.012 (implementing Relative Caregiver Program). Placement with a familiar relative is likely to minimize any potential trauma associated with forming a relationship with a new adult caregiver. Furthermore, adoption by a gay or a lesbian relative is more likely to allow the child to maintain relationships with the rest of his family.

In many other cases, Florida's prohibition denies children, such as John Doe in this case, the opportunity for permanent placement with a familiar and loving gay foster parent or guardian who is willing and well-suited to take care of them, *cf.* Pet. App. 3a (stating "[b]y all accounts," Mr. Lofton's care for John Doe has been "exemplary"), and leaves them vulnerable to removal by the DCF. In recognition of the fact that removal from a long term placement, and specifically from the resulting attachment relationship, can be devastating to a child, Florida has emphasized that foster parents "often are the most desirable adoptive parents for children who have formed strong attachments to them." Fla. Admin. Code r. 65C-

13.009(1)(d)(8). Nationwide, 59% of adopted children are adopted by foster parents.[7] Yet as this case shows, despite the fact that Florida allows children to be cared for by gay or lesbian foster parents or guardians, Florida forecloses this promising adoption avenue to them.

Furthermore, by reducing the number of potential adoptive parents, Florida ensures that many children will never have a family of their own. Despite Florida's significant efforts to recruit a large, diverse pool of heterosexual adoptive parents, there is still a substantial shortage of adults willing to adopt, and there are still thousands of children in need of adoption.[8] According to the United States Department of Health and Human Services, 8,126 children were awaiting adoptions in Florida during fiscal year 2002.[9] Many of these children will never be adopted; they will simply "age out" of the system and will never experience the love and support of a permanent family. Yet Florida categorically disqualifies tens of thousands of potentially qualified parents from providing children with that familial love and support.[10]

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[7] *See* Children's Bureau, U.S. Dep't of Health & Human Servs. (HHS), *The AFCARS Report: Preliminary FY 2001 Estimates as of March 2003* (8), *at* http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf (Mar. 2003).

[8] Among other efforts to facilitate the adoption of children, Florida requires the DCF to design plans for parent recruitment, *see* Fla. Admin. Code r. 65C-16.004; participates in the Interstate Compact on the Placement of Children, *see* Fla. Stat. ch. 409.401; subsidizes the adoption of special needs children, *see* Fla. Stat. ch. 409.166; encourages low-income and African-American families to adopt, *see id.*; Fla. Stat. ch. 409.1755; operates a statewide adoption exchange, *see* Fla. Stat. ch. 409.167; and notifies the public through television, radio, and the internet of children in need of adoption, *see, e.g.*, DCF, Fla. Dep't of Health & Human Servs., *Florida's Adoption Program, at* http://www.state.fl.us/cf_web/myflorida2/healthhuman/adoption/index.shtml (Nov. 8, 2004).

[9] *See* Children's Bureau, HHS, *FY 1998, 1999, FY 2000, FY 2001 and FY 2002 Foster Care: Children Waiting for Adoption, at* http://www.acf.dhhs.gov/programs/cb/dis/tables/waiting2002.htm (Mar. 1, 2004).

[10] According to the 2000 Census, there are an estimated 41,048 same-sex couple households in Florida. *See* Tavia Simmons & Martin O'Connell,

The prohibition also undermines Florida's explicit goal of "ensur[ing] that permanent placement with the biological or adoptive family is achieved as soon as possible for every child in foster care and that no child remains in foster care longer than 1 year." Fla. Stat. ch. 39.001(1)(h). Due to the shortage of adoptive parents, even children in Florida who are fortunate enough to be adopted spend years in foster or other temporary care awaiting adoption.[11] The length of a child's stay in such care has a significant negative impact upon the child's psychological and social development. The longer a child remains in foster care, the greater the likelihood the child's attachment relationships will be qualitatively inferior and, hence, that any psychological or social problems will be irreversible.[12]

Florida's statute is especially detrimental to children with special needs, such as John Doe and John Roe, who are the toughest children to place in adoptive homes and who often wait the longest before being adopted.[13] Many States,

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Married-Couple and Unmarried-Partner Households: 2000 4, *at* http://www.census.gov/prod/2003pubs/censr-5.pdf (Feb. 2003). The 2000 Census did not collect information about the number of single gay men or lesbians.

[11] In 2002, 48% of the children adopted in Florida had spent more than one year in foster care while awaiting adoption. *See* Children's Bureau, HHS, *Time Between TPR and Finalization: October 1, 2001 to September 30, 2002, at* http://www.acf.hhs.gov/programs/cb/dis/tables/time04.htm (Mar. 2004).

[12] *See* Michael Bohman & Sören Sigvardsson, *Outcome in Adoption: Lessons from Longitudinal Studies*, in *The Psychology of Adoption* 93, 106 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) ("[O]ur studies clearly indicate that decisions about the child's legal status should be made as early as possible. Any unnecessary prolongation of the socially, legally, and psychologically insecure limbo-situation of foster care should be avoided, in the best interest of the child.").

[13] Florida defines a "[s]pecial needs child" as one whose "permanent custody has been awarded to the department or to a licensed child-placing agency," Fla. Stat. ch. 409.166(2)(a), and who either has "established significant emotional ties" with foster parents, Fla. Stat. ch. 409.166(2)(a)(1), or is unlikely to be adopted due to the child's age, minority racial status, chronic medical problems, mental or psychological problems, or relationship to other siblings in foster care, Fla. Stat. ch. 409.166(2)(a)(2)(a)-(e).

including Florida, face specific "difficulties in recruiting families to adopt children with special needs"—children such as those with HIV cared for by Mr. Lofton—which makes it very difficult for States to achieve permanent placements for those children. GAO, *Rep. No. GAO-02-585, Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain* 38 (June 2002). The shortage of adoptive parents for special needs children has not escaped the attention of the Florida Legislature, which has explicitly found there is "a lack of permanent adoptive homes for older and disabled children." Fla. Stat. ch. 409.1673(1)(a)(5). Florida's ban on adoption by gay men and lesbians can only worsen this problem.

Nationwide there are 126,000 children awaiting adoption.[14] Florida's categorical exclusion of all gay men and lesbians as adoptive parents exacerbates that problem by "foreclos[ing] the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities[;] it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Stanley*, 405 U.S. at 657.

II. THERE IS NO VALID SCIENTIFIC BASIS TO CONCLUDE THAT ADOPTION BY GAY AND LESBIAN PARENTS DISADVANTAGES CHILDREN

Social science research has established that children are not adversely affected by their parents' lesbian or gay orientation. As a result, all of the mainstream professional organizations in the fields of child health and welfare agree that there is no basis to exclude gay men and lesbians from adopting children. This consensus belies the suggestion by the court of appeals that the research on parenting by gay men and lesbians and its effects on childhood development "ha[s] yielded inconclusive and conflicting results." Pet.

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[14] *See* Children's Bureau, HHS, *National Adoption and Foster Care Statistics, at* http://www.acf.dhhs.gov/programs/cb/dis/afcars/publications/afcars.htm (Aug. 1, 2004).

App. 37a-38a. And it demonstrates that Florida's categorical ban on adoption by gay men and lesbians is not rationally related to the best interests of adoptive children.

A. Every Prominent Pediatric, Psychological, Psychiatric, And Child Welfare Organization To Address The Issue Has Determined That No Child Welfare Basis Exists For Categorically Excluding Lesbians And Gay Men From Adopting Children

The leading professional child health and child welfare organizations oppose the categorical exclusion of gay men and lesbians as adoptive parents. The policy statements issued by these organizations—outgrowths of both their professional experiences and their expert reviews of the research related to the effects of parenting by gay men and lesbians on childhood development—are striking in their similar rejection of the assumption that optimal development requires heterosexual parents. Indeed, the CWLA is unaware of any authoritative child welfare or medical organization that has taken a contrary view of the research and its policy implications.

In 2002, the American Academy of Pediatrics (AAP), the nation's oldest and largest association of pediatricians with over 60,000 pediatrician members, issued a technical report summarizing the "growing body of scientific literature demonstrat[ing] that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual." AAP, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 341 (2002) (AAP Technical Report). The AAP relied on this "considerable body of professional literature" in adopting a formal policy supporting what is commonly known as "second-parent" adoption by same-sex partners. AAP, *Coparent or Second-Parent Adoption by*

Same-Sex Parents, 109 Pediatrics 339, 339 (2002) (AAP Policy Statement).[15]

The American Psychiatric Association (APA), which has over 35,000 physician members, has similarly emphasized that "[n]umerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents," and that "optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and

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[15] Because of the potentially harmful consequences of a State's refusal to recognize the relationship between a child born to or adopted by one member of a same-sex couple and the other member (the "coparent" or "second parent"), *see* Barbara Bennett Woodhouse, *Children's Rights in Gay and Lesbian Families: A Child-Centered Perspective*, in *Child, Family, and State* 273, 291-293 (Stephen Macedo & Iris Marion Young eds., 2003), the focus of the AAP's policy is not surprising. As the AAP emphasized, however, the same research supports adoptions by single gay or lesbian parents. *See* AAP Technical Report, *supra*, at 341.

In opposition to the AAP Policy Statement, approximately 60 of AAP's more than 60,000 members formed the American College of Pediatricians (ACP) in 2002. *See* Pamela P. Wong, Concerned Women for America, *New Pediatricians Group Blasts AAP Endorsement of 'Gay' Parenting*, *at* http://www.cultureandfamily.org/articledisplay.asp?id=4053&department=CFI&categoryid=cfreport (June 4, 2003); *see also* ACP, *Charter Member Physicians*, *at* http://www.acpeds.org/?BISKIT=2344774610&CONTEXT=cat&cat=17 (last visited Dec. 6, 2004). Dr. Joseph Zanga, one of the ACP's charter members, has described the ACP as a group "with Judeo-Christian, traditional values that is open to pediatric medical professionals of all religions *who hold true to the group's core beliefs*: that life begins at conception; and that the traditional family unit, headed by an opposite-sex couple, poses far fewer risk factors in the adoption and raising of children." Bill Fancher & Jody Brown, American Family Ass'n, *Pro-Life Pediatric Group Stands Contrary to Established AAP*, *at* http://headlines.agapepress.org/archive/7/afa/292003e.asp (July 29, 2003) (emphasis added). On January 22, 2004, the nascent ACP issued a position statement supporting the "age-old prohibition on homosexual parenting, whether by adoption, foster care, or by reproductive manipulation." ACP, *Homosexual Parenting: Is It Time for Change?*, *at* http://www.acpeds.org/?CONTEXT=art&cat=10005&art=50&BISKIT=2684987796 (Jan. 22, 2004).

nurturing adults." APA, *Adoption and Co-parenting of Children by Same-sex Couples: Position Statement*, *at* http://www.psych.org/du/other_res/lib_archives/archives/200214.pdf (Nov. 2002). In view of this body of research, the APA adopted a formal policy supporting adoption by same-sex couples. *Id.*

The American Psychological Association, which has over 150,000 psychologist members, resolved to oppose "any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care and reproductive health services" and to support "the protection of parent-child relationships through the legalization of joint adoptions and second parent adoptions of children being reared by same-sex couples." American Psychological Ass'n, *Resolution on Sexual Orientation, Parents, and Children*, *at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf (July 2004). The resolution was predicated on the Association's findings that:

> (1) "[t]here is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children"; and
>
> (2) "[r]esearch has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."

Id.

Likewise, the American Academy of Child and Adolescent Psychiatry (AACAP), an association of over 6,500 psychiatrists, has determined that "[t]here is no evidence to suggest or support that parents with a gay, lesbian, or bisexual orientation are per se different from or deficient in parenting skills, child-centered concerns and parent-child attachments, when compared to parents with a heterosexual orientation," and further that "[o]utcome studies of children raised by parents with a homosexual or

bisexual orientation, when compared to heterosexual parents, show no greater degree of instability in the parental relationship or developmental dysfunction in children." AACAP, *Policy Statement: Gay, Lesbian, and Bisexual Parents*, *at* http://www.aacap.org/publications/policy/ps46.htm (June 1999). As a result, the AACAP resolved to oppose "any discrimination based on sexual orientation against individuals in regard to their rights as custodial or adoptive parents." *Id.*[16]

The National Association of Social Workers (NASW), the nation's preeminent organization of professional social workers with over 153,000 members, has observed:

> The literature ... undermines negative assumptions about gay men and lesbians as parents. The most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies.

NASW, *Social Work Speaks: Policy Statements 2000-2003* 194 (5th ed. 2000).

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[16] Two other family medical organizations have issued policy statements opposing categorical bars to adoption by gay men and lesbians. The American Academy of Family Physicians (AAFP), an association of over 93,700 family physicians, family medicine residents, and medical students, has adopted a policy of "promot[ing] a safe and nurturing environment, including psychological and legal security, for all children, including those of adoptive parents, regardless of the parents' sexual orientation." *See* AAFP, *Children's Health*, *at* http://www.aafp.org/x16320.xml (2003). In the same vein, the American Psychoanalytic Association, a professional organization of over 3,500 psychoanalysts, has unequivocally stated: "Gay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents." Am. Psychoanalytic Ass'n, *Position Statement on Gay and Lesbian Parenting*, *at* http://www.apsa-co.org/ctf/cgli/parenting.htm (May 16, 2002).

Finally, the CWLA itself opposes categorically barring gay men and lesbians from becoming adoptive parents:

> Applicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing life style, or *sexual orientation.*

CWLA, *CWLA Standards of Excellence for Adoption Services* § 4.7 (rev. ed. 2000) (CWLA Standards) (emphasis added). The CWLA formulated this policy based on the research conducted in, and experiences of, the fields of social work, child development, psychology, psychiatry, medicine, and sociology.[17]

B. The Court Of Appeals Suggested A Conflict Of Opinion About The Conclusions And Merits Of The Social Science Research That Does Not Exist

In concluding that Florida had a rational basis for banning gay men and lesbians from adopting, the court of appeals incorrectly characterized "the question of the effects of homosexual parenting on childhood development [as] one on which even experts of good faith reasonably disagree" and the Florida legislature as simply having "credit[ed] one side of the debate over the other." Pet. App. 38a. In reality, no such split of authority or opinion exists.

The professional organizations discussed above all oppose categorical bars on adoption by gay men and lesbians because study after study consistently has demonstrated both that gay and lesbian parents are as capable as heterosexual parents and that children of gay and lesbian parents fare just as well as children of heterosexual parents.

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[17] *See* CWLA Standards, *supra*, at v. The North American Council on Adoptable Children (NACAC), an organization of child welfare professionals and adoption agencies, as well as foster and adoptive parents and advocacy groups focused on the needs of adoptive children, has adopted the same policy. *See* NACAC, *NACAC Position Statements: Gay and Lesbian Adoptions and Foster Care, at* http://www.nacac.org/pub_statements.html#gay (Apr. 14, 2002).

Although a complete review of the literature is beyond the scope of this brief, this body of research, which spans over 25 years, is essentially unanimous with respect to the following key findings:

- Lesbian mothers and gay fathers are as devoted to their children as heterosexual parents.[18]
- Lesbian mothers and gay fathers perform as well as heterosexual parents on every measure of parenting skills.[19]
- Children of gay and lesbian parents do not experience higher rates of, or more severe, emotional or behavioral problems than children of heterosexual parents.[20]
- Children of gay and lesbian parents fare as well on assessments of peer relationship quality and popularity among peers as children of heterosexual parents.[21]

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[18] *See, e.g.*, Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. Marriage & Fam. 1052, 1056 (2000) (review of research reveals no significant differences in warmth shown by lesbian and heterosexual mothers toward children); Jerry J. Bigner & Frederick W. Bozett, *Parenting by Gay Fathers, in* 14 Marriage and Family Review 155, 164 (Frederick W. Bozett & Marvin B. Sussman eds., 1990) (research has demonstrated no significant differences between gay fathers' and heterosexual fathers' expressions of intimacy toward children).

[19] *See, e.g.*, Bigner & Bozett, *supra* n.18, at 163 (review of literature reveals "[n]o differences ... between heterosexual and homosexual fathers in problem-solving, providing recreation for children, encouraging their autonomy, handling problems relating to childrearing, having relatively serious problems with children, or having generally positive relationships with children"); Ellen C. Perrin, *Sexual Orientation in Child and Adolescent Health Care* 115 (2002) (review of literature demonstrates that lesbian mothers have more successful parenting skills than heterosexual comparison groups).

[20] *See, e.g.*, Perrin, *supra* n.19, at 118-126 (review of literature reveals no significant differences in emotional and conduct difficulties between children of gay or lesbian parents and children of heterosexual parents).

[21] *See* Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025, 1033-1034 (1992) (review of existing research reveals no significant differences in quality of peer relationships or popularity

- No relationship exists between parental sexual orientation and a child's cognitive abilities and development.[22]
- Children of gay and lesbian parents are not more likely to be gay and lesbian themselves.[23]
- Lesbians and gay men have the same capacity as heterosexuals to form stable, long-lasting, intimate relationships that are comparable in quality to heterosexual relationships and, therefore, they can provide stable, two-parent families as well as heterosexual couples.[24]

In short, this body of research has demonstrated that lesbian and gay parents can and do provide loving and secure parent-child relationships that afford the same benefits to

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among peers). One study has demonstrated that *if* children of gay and lesbian parents are teased, they are more likely than their peers to be teased about their families, but that they are not more likely than other children to be teased. *See* K. Vanfraussen et al., *What Does It Mean for Youngsters to Grow Up in a Lesbian Family Created by Means of Donor Insemination?*, 20 J. Reproductive & Infant Psychology 237 (2002).

[22] *See, e.g.*, Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 172 (2001) ("[A]cross studies, no relationship has been found between parental sexual orientation and measures of children's cognitive ability.").

[23] *See, e.g.*, Patterson, *supra* n.21, at 1031-1032 ("[S]exual preference among offspring of gay and lesbian parents was found in every study to fall within normal bounds."). There is some evidence indicating that children of gay or lesbian parents may be more comfortable acknowledging or acting on same-sex attraction if they have such feelings, which is hardly surprising. *See* Stacey & Biblarz, *supra* n.22, at 170-171. Nonetheless, the majority of children raised by gay or lesbian parents, like most children raised by heterosexual parents, grow up to be heterosexual. *Id.* Sexual orientation should not be confused with sex-role behavior, which refers to behaviors and attitudes that society typically associates with the male or female gender. Some studies have found daughters of lesbian mothers to be less rigidly sex-stereotyped. *See* Patterson, *supra* n.21, at 1030 (discussing study in which daughters of lesbians were found to be less rigidly sex-stereotyped (*e.g.*, playing with both dolls and trucks) than daughters of heterosexual parents).

[24] *See, e.g.*, Patterson, *supra* n.18, at 1053 (review of research reveals "no differences as a function of sexual orientation on any of the measures of relationship quality").

children as heterosexual parents. The facts that these studies have been published in reputable, peer-reviewed journals and relied upon by knowledgeable experts are testaments to the soundness of the studies' methodologies.[25]

In contrast, no reliable study has identified any risk to children from being raised by gay parents. In suggesting that there were "other studies [finding] that children raised in homosexual households fare [worse] than children raised in similarly situated heterosexual households," *see* Pet. App. 36a, the court of appeals pointed to a single study purporting to find that children of gay parents have an increased risk of sexual victimization by a parent and suffer from a disproportionately high incidence of emotional distress. *See id.* at 825 n.25 (citing Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 Adolescence 757, 770-774 (1996)). But, as the CWLA and other *amici* advised the court of appeals, Paul Cameron, the author of this study, has been widely discredited for misrepresenting and misconstruing sociological research on homosexuality and its effects. The APA expelled Cameron, and the American Sociological Association denounced him for willfully misrepresenting research. *See* Stacey & Biblarz, *supra* n.22, at 161. Moreover, a federal district court determined that Cameron's conclusions, and specifically his conclusion that homosexuals abuse children at a greater rate than heterosexuals, constituted a "total distortion" of the data. *See Baker* v. *Wade*, 106 F.R.D. 526, 536 (N.D. Tex.), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985); *see also Gay*

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[25] Because the research has shown that children of gay and lesbian parents fare just as well as children of heterosexual parents, ideological opponents of parenting by gay men and lesbians have challenged the body of research as flawed. *See, e.g.*, Robert Lerner & Althea K. Nagai, Marriage Law Project, *No Basis: What the Studies* Don't *Tell Us About Same-Sex Parenting, at* http://marriagelaw.cua.edu/publications/nobasis.pdf (Jan. 2001), *cited in* Pet. App. 36a, n.24. These attacks are red herrings. They attempt to hold this specific area of research to impractical standards that are not generally applicable to psychological research. They also fail to produce any evidence supporting the contrary position that lesbians and gay men are less capable parents.

Student Servs. v. *Texas A&M Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984) (dismissing Cameron's conclusions as speculative and without historical or empirical basis).

The only other source cited by the court of appeals as evidence of "other [conflicting] studies," Pet. App. 36a, was not itself a study but a survey of the body of research. *Id.* n.25 (citing Stacey & Biblarz, *supra* n.22). And, in fact, that survey concluded that there are no significant developmental differences between children of gay and lesbian parents and children of heterosexual parents. Indeed, the authors of the survey forcefully concluded that "[b]ecause every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's 'best interest.'" Stacey & Biblarz, *supra* n.22, at 176. The authors went on to note that any measurable differences between children of lesbian and gay parents and those of heterosexual parents "cannot be considered deficits .... They either favor the children with lesbigay parents, are secondary effects of social prejudice, or represent 'just a difference' ...." *Id.* at 177.[26]

In sum, the reasonable debate between experts posited by the court of appeals does not exist. Rather, the evidence that parenting by gay men and lesbians is not harmful to children is so well established, and so far beyond reasonable scientific dispute, that it is irrational for Florida to believe

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[26] Even if doubt remained as to the parenting qualifications of some gay men and lesbians, Florida's categorical exclusion would lack a rational basis. "Procedure by presumption is always cheaper and easier than individualized determination." *Stanley*, 405 U.S. at 656-657. Yet, because the DCF conducts a detailed evaluation of each candidate's parenting qualifications, there is no reason to use sexual orientation as a proxy for capacity to parent. *Cf. Orr* v. *Orr*, 440 U.S. 268, 281 (1979) ("Under the [state alimony] statute, individualized hearings at which the parties' relative financial circumstances are considered *already* occur. There is no reason, therefore, to use sex as a proxy for need." (internal citations omitted)).

that the best interests of children are served by prohibiting gay men and lesbians from adopting.

* * * * *

Because Florida's categorical prohibition does not benefit children but instead is detrimental to their best interests, the only purpose of the prohibition can be to express animus toward an unpopular group. *See Romer* v. *Evans*, 517 U.S. 620, 634-635 (1996). On several occasions this Court has held it "illogical and unjust" and a violation of equal protection for a State to punish innocent children in order to express disapproval of an adult's actions. *See Plyler* v. *Doe*, 457 U.S. 202, 220 (1982) (stating statute excluding children of illegal aliens from public education "does not comport with fundamental conceptions of justice," where state is concerned with alleged misconduct of parents, not children); *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (stating statute denying equal recovery rights to illegitimate children is "illogical and unjust" and "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"). Just so here; it is "illogical and unjust" for Florida to punish the thousands of children in Florida in need of the love and support of a family they can call their own by denying them the opportunity to be adopted by loving and capable adults.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-478

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN LOFTON, *et al.*,

Petitioners,

– v.–

SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' OBJECTION TO MOTION OF THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

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RESPONDENTS' OBJECTION TO MOTION OF THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

Respondents object to the motion of the Child Welfare League of America for leave to file a brief amicus curiae in support of Petitioners in this proceeding. The reasons why leave should be denied are as follows:

1. The amicus brief that the Child Welfare League of America ("CWLA") wants to file sets forth the claim that Florida's gay adoption law is irrational because it conflicts with its own position on gay adoption and that of other organizations. Am. Brief, p. 11. It also says that social science regarding same-sex parenting puts the issue "beyond reasonable scientific dispute." Am. Brief, p. 19. The fact of the matter, however, is that no social science or expert testimony on gay parenting were ever presented to the district court at summary judgment. Brief in Opp., pp. 1-3. CWLA's arguments are therefore not relevant to the disposition of this case at summary judgment, and represent an unnecessary expansion of the issues in it.

2. Even if the policy preferences of CWLA and others were relevant to this case, those policy preferences confer no constitutional importance on the question presented. Congress itself has repeatedly rejected CWLA's policy preferences in legislating adoption policy, as when it mandated color-blind adoptions in the mid-1990's over the objections of CWLA and others who had advocated race-based adoptions for a generation, beginning in the early 1970's. Brief Amicus Curiae of the Hon. R.J. Ball, et al., Twenty-One Members of the Legislature of the State of Florida, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004), pp. 5-9.

3. The same-sex parenting research that CWLA cites also fails to raise any important constitutional issues. Among other things, the research is fundamentally flawed.

CWLA relies, for example, on the work of Dr. Charlotte Patterson. Am. Brief, p. 16, n.18. In the last state court challenge to the gay adoption law, the trial court struck Dr. Patterson's opinion testimony regarding her own studies because she refused the trial court's order to produce the data she supposedly based them on, leading the court to question her impartiality in a written opinion. *Amer v. Johnson*, 4 Fla.L.Wkly.Supp. 854b (Fla. 17th Cir. 1997).

CWLA's same-sex parenting research also does not deal with the issue in this case, which concerns the welfare of children adopted by homosexual parents. The studies in this area do not involve adopted children. Rather, they involve the natural children of homosexual parents who have known the parent since birth and formed corresponding emotional attachments. Unlike adopted children, the children in CWLA's studies have not been drawn from a largely foster care population already at immensely greater risk of psychological disorder. *See* John G. Orme and Cheryl Fletcher, "Foster Family Characteristics and Behavioral and Emotional Problems of Foster Children: A Narrative Review," *in Family Relations*, Vol. 50, No. 1 (2001), pp. 3-15.

Additionally, only a tiny few of the relevant studies involve child rearing by gay men as opposed to lesbian women. As even Dr. Patterson admitted as late as 2004, "research on gay men who have chosen to become parents has barely begun," is "relatively recent" and "still sparse." Patterson, Charlotte J., "Gay Fathers," *in* The Role of the Father in Child Development 397, 407, 410 (Michael E. Lamb, ed., 2004). Such studies as exist are plagued by problems like small sample size, selection bias and varied sampling procedures. *Id.* at 404, 408. For this reason, Dr. Patterson acknowledges that "many important questions remain to be addressed, and there is much for future researchers to accomplish in this area." *Id.* at 410. As the court of appeals recognized, these and other grievous methodological flaws permeate the body of literature on this subject. Pet. App. 36a.

Rather than confront the shortcomings of the research in straightforward fashion, CWLA makes the suggestion – unsupported by a single piece of scientific or other authority – that same-sex parenting studies are somehow exempt from statistical rigor because they are psychological studies. Am. Brief, p. 18, n.25. Even the researchers CWLA relies upon disagree, however, as in the case of Dr. Patterson, who candidly notes that methodological flaws are a problem in the research, and recommends that future researchers correct the problem by employing "rigorous statistical procedures." *Id.* at 412; *see also* Judith Stacey and Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 166 (2001)(stating "there are no studies of child development based on random, representative samples" of same sex parent households); *see also* Brief Amicus Curiae of the Hon. R.J. Ball, et al., Twenty-One Members of the Legislature of the State of Florida, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004), pp. 12-16.

CONCLUSION

Given the foregoing, CWLA's proposed amicus brief is not relevant to the issues in this case, unnecessarily expands those issues, and raises no constitutionally significant points bearing on the question of whether this case merits certiorari. CWLA's motion should therefore be denied.

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